No. 681

In the Supreme Court of the United States

OCTOBER TERM, 1960

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

ARCHIBALD COX,
Solicitor General,
LEE LOEVINGER,
Assistant Attorney General,
RALPH S. SPRITZER,
RICHARD J. MEDALIE,
Assistants to the Solicitor General,
RICHARD A. SOLOMON,
RICHARD H. STERN,
Attorneys,
Department of Justice, Washington 25, D.C.

ROBERT W. GIBBANS,
General Counsel,
LEONARD S. GOODMAN,
Attorney,
Interstate Commerce Commission,
Washington 25, D.C.

INDEX

CITATIONS

Cases:

Statutes—Continued

Miscellaneous—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 681

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

OPINION BELOW

The opinion of the three-judge district court (R. 196–203) is reported at 189 F. Supp. 942. The report of the Interstate Commerce Commission (R. 10–28) is published at 312 I.C.C. 185.

JURISDICTION

The final judgment and order of the district court was entered on December 19, 1960 (R. 204). Notice of appeal was filed on January 9, 1961 (R. 205). This Court noted probable jurisdiction and granted a motion to advance the case on February 20, 1961 (R. 211).

Jurisdiction of this Court to review the final judgment and order of the district court is conferred by 28 U.S.C. 1253.

QUESTION PRESENTED

Whether Section 5(2)(f) of the Interstate Commerce Act requires that the Commission, as a condition of its approval of a rail consolidation or merger, order the carriers to maintain employees in their existing or in comparable jobs for a four-year period (as appellants' contend), or the Section is satisfied (as the government contends) by provision for compensatory benefits during the protective period.

STATUTE INVOLVED

Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. 5(2)(f), provides:

> As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in

the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or repesentatives of its or their employees.

STATEMENT

This is a direct appeal from a final judgment of a three-judge District Court for the Eastern District of Michigan (Southern Division) dismissing a complaint of the Brotherhood of Maintenance of Way Employes ("Brotherhood") and the intervenor Railway Labor Executives' Association ("RELA") which sought to set aside an order of the Interstate Commerce Commission. The Commission's order approved a merger of the Delaware, Lackawanna & Western Railroad Company into the Erie Railroad Company, with the surviving railroad to be known as Erie-Lackawanna Railroad Company. The complaint attacked only that portion of the Commission's report and order which related to the protection of employees.

The administrative proceedings: On July 1, 1959, Erie and Lackawanna filed a joint application for the Commission's approval of a proposed merger pursuant to Section 5(2) of the Interstate Commerce Act (49 U.S.C. 5(2)). The application stated that "The applicants consent to the entry of an order by the Commission for the protection of employees in conformity with the order in *New Orleans Union Passenger Terminal Case,* 282 I.C.C. 271 (1952)" (at 37).

The so-called "New Orleans" conditions provide financial compensation or payments to employees, as follows:

(1) A displaced employee, *i.e.*, an employee who "is placed in a worse position with respect to his compensation and rules governing his work conditions" (R. 155), receives "a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the monthly compensation received by him in the position from which he was displaced" (R. 155–156), for a period of four years from the effective date of the Commission's order of approval.

(2) A dismissed employee, *i.e.*, an employee who loses his job, receives a monthly dismissal allowance equivalent to his average compensation during the last 12 months of his employment, less his earnings in other employment and benefits under any unemployment insurance law, for a period of four years from the effective date of the Commission's order of approval (R. 156–157).

3. A dismissed employee may elect to resign and to accept a lump sum separation allowance determined in accordance with a schedule providing for 3 months' pay for 1 year of service ranging upward to 12 months' pay for 15 years of service.

(4) A transferred employee receives comprehensive reimbursement of moving costs and any loss on sale of home, "provided, however, that changes in place of residence, subsequent to the initial change caused by the transaction, which result from the

exercise by the employee of his seniority rights shall not be considered as within the foregoing provision"[1] (R. 157–158).

(4) No employee affected by the transaction approved may be deprived, during the protective period, of benefits attached to his previous employment, such as free transportation, pensions, hospitalization, relief, et cetera (R. 157).

It was further provided (R. 153–154), that any employee who should receive total dismissal or displacement compensation less than he would receive under the Washington Job Protection Agreement of 1936, should continue, following the expiration of the four-year period, to receive compensatory payments under the terms of that agreement until he received the total compensatory benefits provided by the agreement. The purpose of this provision was to provide added compensatory protection for an employee who is dismissed or displaced toward the end of the four-year period. For example,[2] under the Washington Agreement an employee with 15 or more years of service, and whose average monthly compensation has been $400, is entitled to a monthly allowance of 60% of $400 for a period of 60 months, or a total of $14,400 (R. 143–144). Without this provision, such an employee who was dismissed 12 months before the end of the four-year period would receive $400

[1] There is a corresponding limitation in the Washington Job Protection Agreement (R. 149).

[2] In this example, no adjustment is made for possible earnings in other employment.

per month for only 12 months, a total of $4,800. The effect of this provision is that, following such 12 months, he will continue to receive $240 per month until he has received dismissal compensation totalling $14,400, *i.e.*, for 40 additional months.[3]

A hearing examiner conducted extensive hearings upon the foregoing application in which interested persons and groups, including appellant RLEA, participated as parties. The applicant railroads introduced evidence as to the cost of compliance with the "New Orleans" conditions for the protection of employees. RLEA introduced no evidence at these hearings. After the evidentiary record was closed, RLEA, in its brief filed with the hearing examiner, claimed (R. 170) that Section 5(2)(f), makes it mandatory upon the Commission, in approving any transaction under Section 5, to impose conditions requiring that no employees shall be

> deprived of employment or placed in a worse position with respect to their employment or compensation due therefor for a period of four years from this Commission's order of approval herein, because of the merger of the said railroads or any program of economies undertaken as a result thereof [R. 189].

This marked the first occasion, in this or any other proceeding, that RLEA contended that Section

[3] These protective conditions are unique. A recent study by the Department of Labor indicates that as of 1955–56 the average dismissal pay received after 25 years of service in industry generally (*i.e.*, excluding railroads and airlines) is 30.7 *weeks* pay. *Collective Bargaining Clauses: Dismissal Pay*, Bulletin No. 1216, U.S. Department of Labor (1957) p. 9.

5(2)(f), enacted in 1940, could not be satisfied by protection in the form of monetary compensation.

In his findings (which were adopted by the entire Commission as its own with some supplementation (R. 12)), the Hearing Examiner found that, "In recent years the operations of [Erie and Lackawanna] produced income less than sufficient to satisfy their annual fixed charges and contingent interest payments and resulted in both railroads being financially weak despite continued efforts to reduce avoidable operating costs individually, and to coordinate certain separate operations[4] to the financial benefit of both" (312 I.C.C. at 244). Analyzing the applicants' estimate that the merger would result in increasing their combined income available for fixed and contingent charges before Federal income taxes by $13,542,038 (*id.* at 213), the Hearing Examiner concluded that, "The savings which the merger would permit, even if only partly realized within the first 5 years after the merger is consummated, warrants approval of the transaction * * * (*id.* at 248). He pointed out that (*id.* at 247):

> * * * Among the contributing advantages which justify the approval of the merger and the proposed related authorizations are the resulting general improvement in providing transportation service under conditions permitting more efficient use of motive power and equipment; elimination of duplicative facilities and

[4] This refers to the joint use of terminals and trackage authorized by the Commission in *Erie R. Co. Trackage Rights*, 295 I.C.C. 303, and *Delaware L. & W. R. Co. Trackage Rights*, 295 I.C.C. 743.

savings in traffic and general expenses; consolidation of freight and passenger terminal facilities; consolidation and modernization of yards, and locomotive and car shops; and reductions in the combined costs of traffic, accounting and other departments. The greater financial stability of the unified company would permit operational improvements requiring larger expenditures than either applicant would be able to finance under present conditions, and the availability of sites for industrial development where facilities which would be abandoned are situated would tend to generate traffic presently not moving over the lines of the applicants.

The only evidence as to the effect of the proposed merger upon the employees consisted of studies and estimates introduced by the applicants. These indicated that the merged railroad would start with 27,689 employees, and that over a five year period 1,982 jobs would be abolished, 2,159 jobs would be transferred and 11,186 jobs would be created by attrition. The cost to the merged railroad of compliance with the New Orleans protective conditions for employees was estimated at $3,108,000 without adjustment for income taxes (*id.* at 233–234).

The Hearing Examiner recommended that the proposed merger be approved subject, *inter alia,* to the "New Orleans" conditions for the protection of employees.

Upon exceptions to the Hearing Examiner's report, and following oral argument, the entire Commission approved the merger as consistent with the public interest and, in a detailed discussion, affirmed the Hearing Examiner's conclusion that the requirements

of Section 5(2)(f) would be fully satisfied by the compensatory protection of the New Orleans conditions.[5]

The proceedings in the lower court: The present action was instituted on October 7, 1960, in the District Court for the Eastern District of Michigan (R. 1–9), by the Brotherhood of Maintenance of Way Employes. RLEA, and Erie and Lackawanna, intervened as plaintiff and defendants, respectively.

On October 12, 1960, a hearing was held before District Judge Thornton on the appellants' application for a temporary restraining order. During this hearing, Judge Thornton received the testimony of Harold J. Crotty (R. 42) and various exhibits (Plaintiff's Exhibits 1 through 7, R. 84–159) on the issue of whether a temporary restraining order should issue to protect the appellants from irreparable damage within the meaning of 28 U.S.C. 2284(3).

On October 14, Judge Thornton entered a temporary restraining order broadly preserving the status of all employees in their existing jobs and enjoining transfers (R. 161–162).

---

[5] Addressing itself to appellants' job-freeze contention, the Commission also stated (R. 26):

> * * * Assuming that we have the power to impose conditions like those requested by the association, in our opinion, such action would not be consistent with the public interest. Conditions calculated to preserve unneeded jobs, would unduly restrict the applicants in the establishment of most economical operations, would be wasteful, and would be in conflict with the objectives of the national transportation policy, under which we are enjoined to promote economical and efficient service and to foster sound economic conditions in transportation and among the several carriers. * * *

In a stipulation dated November 4, 1960 (R. 169–171), all of the parties agreed as to "the sole issue to be litigated in this action, namely, the interpretation of the mandatory requirements of Section 5(2)(f)."

On November 15, 1960, the three-judge court heard oral argument on the merits. At the beginning of the argument, the appellants asked the court to receive and consider on the merits of the case, as "amplifying" the record made before the Commission, the testimony and exhibits received by Judge Thornton on the application for a temporary restraining order. The three-judge court ruled that if it later decided that it should consider that evidence, it would give the defendants an opportunity to present evidence (R. 172–180). The court never did consider the evidence.

On December 7, 1960, the three-judge court rendered its unanimous opinion (R. 196–203) sustaining the Commission's order and its construction of Section 5(2)(f). On December 19, the court entered its judgment (R. 204) dismissing the complaint and vacating the temporary restraining order.

This Court's order of February 20, 1961, noting probable jurisdiction (R. 211) granted the appellants' application for a stay of the judgment insofar as it vacated the temporary restraining order previously issued by Judge Thornton, and has the effect of reinstating that order.[6]

---

[6] The appellants' notice of appeal designated as a part of the record to be transmitted to this Court items 7 and 8, consisting of the Crotty testimony and exhibits received by Judge Thornton on the application for a temporary restraining order—material which the three-judge court refused to consider on the merits. On January 23, 1961, Judge Thorton denied the motion of the United States and the Commission to strike

SUMMARY OF ARGUMENT

The first sentence of Section 5(2)(f) requires the Commission to impose, as a condition of its approval of a merger or consolidation, a "fair and equitable arrangement" for the protection of affected employees. The second sentence (upon which appellants ground their case) requires the establishment of minimum safeguards during a four-year period following the date of the Commission's order of approval—specifically, that the Commission shall impose "terms and conditions" to the end that the "transaction will not result in employees * * * affected by such order being in a worse position with respect to their employment". The third sentence, or proviso, preserves to employees the right to protect their interests by collective bargaining.

In our view, the second sentence, with its provision for the protection of "affected" employees, requires that those who are economically injured in consequence of a Section 5 transaction receive a full measure of compensatory benefits for the statutory period. This means, in addition to compensation for lost wages, compensation for the other incidents of employment, such as costs of transfer, hospitalization, free transportation, and the like.

Appellants contend, however, that they must be maintained *in* their present employment for the statutory period. The palpable weakness of this contention is that the statute does not in terms say that

these items from the record to be certified to this Court (R. 210). We believe that this material, which was not presented to the Commission, is not properly before this Court.

employees may not be discharged, although such a thought is certainly not difficult to express. Moreover, if all employees must be maintained in their existing employment following approval of a merger, it is difficult to understand the reference to employees "affected" by the merger.

A further weakness is that Congress considered the job-freeze approach—one which it had previously adopted in the Emergency Railroad Transportation Act of 1933. During consideration of the legislation which became Section 5(2)(f), Congressman Harrington offered an amendment which would have prohibited Commission approval if the proposed transaction would result "in unemployment or displacement of employees of the carrier or carriers * * *." The Harrington Amendment, however, was rejected. A substitute proposal thereupon replaced the specific language of job freeze with the language which is now before the Court—no "worse position with respect to their employment." To be sure, the proponents of the original Harrington Amendment vigorously supported the substitute; but their choice, at that point, was to do so or to fail completely in their efforts to hedge the Commission's discretion with a requirement that it provide minimum safeguards. The crucial fact is that the language was significantly changed, as the members of Congress were well aware. Moreover, the conference committee report which approved the substitute stated that "benefits to employees will be required to be paid." In similar vein, several conferees (including the House chairman) participating in the ensuing debate indicated that the statute called for

the payment of benefits to those who were displaced. We do not say that the substitute language was defined with precision during the course of the legislative proceedings. We do urge, however, that a marked change was deliberately made after the original Harrington Amendment was defeated and that appellants cannot point to any persuasive history which would justify the Court in reading into the final text the very requirement which Congress omitted.

Far from aiding appellants, the opinions of this Court show that the Court has assumed, either implicitly or explicitly, that Section 5(2)(f) calls for the payment of compensatory benefits. In the most recent case involving the section (*Order of Railroad Telegraphers* v. *Chicago & North Western Railway Co.*, 362 U.S. 330), four Justices, in dealing with the question whether a request for absolute job protection was a proper subject of collective bargaining as between a railroad and its employees, stated that the Commission would be without power to order a job freeze (*id.* at 357 (dissenting opinion)). Yet, appellants here are contending that the Commission can order nothing short of a job freeze. No member of this Court has ever subscribed to appellant's view.

Examination of twenty years of administrative history shows that the Commission has proceeded, from the beginning and without exception, upon the premise that the statute is satisfied by compensatory benefits. Over the years, the Commission, with the active participation of the railroad brotherhoods, has evolved various types of conditions deemed appropri-

ate to the statutory objective, all cast in terms of monetary compensation, including the comprehensive "New Orleans" conditions imposed in this case. Not the least suggestive feature of this long history of consistent administrative practice is that, until the instant case, the representatives of railway labor have openly agreed with the Commission's premise and have sought "terms and conditions" providing financial benefits.

We emphasize finally that there is no occasion for this Court to consider whether in the particular circumstances of this transaction the "New Orleans" conditions will provide full financial protection. No challenge on this point was raised before the Commission and no evidence on the subject was offered. In the district court, moreover, appellants stipulated that "the sole issue to be litigated" was "the interpretation of the mandatory requirements of Section 5(2)(f)." If appellants, as their brief to this Court suggests, desire to raise the question whether the "New Orleans" conditions provide adequate compensatory benefits, they must present their contentions and their evidence, in the first instance, to the Commission. The opportunity is still open, for the Commission has full power to entertain supplemental proceedings and to issue further orders.

ARGUMENT

I

THE LANGUAGE OF SECTION 5(2)(f) DOES NOT COMPEL THE COMMISSION TO APPROVE RAILROAD CONSOLIDATIONS ONLY ON CONDITION THAT ALL EMPLOYEES SHALL BE MAINTAINED IN ACTIVE JOB STATUS

Section 5(2)(f) provides a rounded and well-balanced method for protecting employees affected by a railroad merger.

The first sentence declares that the Commission, as a condition of approving a merger or consolidation, "shall require a fair and equitable arrangement to protect the interest of the railroad employees affected." Obviously, this constitutes a broad grant of discretion to the Commission to do what it deems necessary in the particular circumstances to aid those who are "affected" and hence faced with losses. As this Court has held, this sentence is a flexible provision which permits the Commission to go beyond the minimum required by the succeeding sentence. See *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142, discussed *infra*, pp. 43–47, holding that it authorizes the Commission to provide protection for a period extending more than four years from the effective date of its order approving a merger.

The second sentence requires the Commission to prescribe "terms and conditions" insuring that the transaction "will not result in employees * * * being in a worse position with respect to their employment" for a four-year period following the date of its order. This sentence establishes a floor below

which the Commission may not go. Protection must be provided for at least four years. As to the *kind* of protection which is required, we believe that it imposes upon the Commission the duty to assure the employee entirely adequate compensation for the various incidents of employment which may be lost or impaired as a result of the merger.[7] Unlike appellants, however, we do not read the sentence to mean that employees must be maintained in their jobs.

The third sentence of the section completes the scheme. It provides simply that nothing in the first two sentences shall inhibit employees from undertaking to protect their interests by entering into voluntary agreements with the carrier or carriers.

The district court held (R. 199–200), as a matter of statutory construction, that the "plain language" of Section 5(2)(f) of the Act precludes a reading "that continued employment of affected employees is required to be imposed" before the Commission may approve a railroad consolidation. It concluded that the use of the phrase "in a worse position with respect to their employment," instead of language "clearly stating that the railroads may not discharge affected employees," showed that Congress did not propose to require the imposition of "any specific condition, much less that of guaranteed employment" (R. 199), and that an "approach giving effect to each phrase [in the section] necessitates

[7] As to the variety of incidents which may be involved in loss of employment, see the discussion of the "New Orleans" conditions, *supra*, pp. 4–5, and the different types of benefits provided for in the Washington Job Protection Agreement of 1936 (R. 139–151).

denying the construction contended for by plaintiffs" (R. 200). We think the lower court's construction of the language of the section is both natural and correct. At the very least, appellants have a very heavy burden when they claim that the general language in which the second sentence of the section is couched has a single specific and inflexible meaning: that an absolute job freeze must be imposed in every case in which the Commission approves a merger.

The most obvious feature of Section 5(2)(f) is that it does not say in words that all employees shall be retained in their employment. Instead, it talks of "terms and conditions" which the Commission shall impose to insure that affected employees will not be placed "in a worse position with respect to their employment." The generality of this language takes on particular significance in the context in which it was adopted. As we shall show more fully under Point II, *infra*, before, during, and after the time when this language was adopted, Congress knew how to draft language which would require absolute job protection. Thus, in the Emergency Railroad Transportation Act of 1933 (48 Stat. 211, 214, Section 7(b)), Congress expressly provided that "the number of [railroad] employees in the service of a carrier shall not be reduced" in any one year more than by 5%, "nor shall any employee in such service be deprived of employment * * *". And in the Harrington Amendment to Section 5(2)(f) as originally proposed by the House Committee (for which the present language is a substitute; see pp. 29, 32–33, *infra*), it was stated with equal clarity that no transaction

should be approved by the Commission "if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees" (84 Cong. Rec. 9882). And only three years later, in an amendment to the Communications Act permitting the merger of two domestic telegraph companies (57 Stat. 5), it was provided (a) that each employee of a merging carrier "shall be employed by the carrier resulting from such consolidation or merger for a period of not less than four years" (47 U.S.C. 222(f)(1)) and (b) that no such employee "shall, without his consent, have his compensation reduced, or * * * be discharged or furloughed during the four-year period" (47 U.S.C. 222(f)(7)).[8]

---

[8] The legislative history of the 1943 amendment to the Communications Act reveals that Congress was aware that, in requiring a job freeze, it was going further than it had only three years before in providing in Section 5(2)(f) for the protection of railroad employees affected by a merger. Thus, Senator McFarland, co-sponsor of the 1943 amendment, stated (88 Cong. Rec. 3415):

> * * * We have, therefore, gone further in this bill to protect the man who has become trained in the telegraph profession from losing his position and seniority than any legislation ever enacted by Congress.

The clear distinction between the employee protection for telegraph operators under Section 222(f) and that provided in Section 5(2)(f) was clearly brought out in a discussion between Senator Aiken (an opponent of the bill) and Senator White (a proponent) during the Senate consideration of the conference committee report (89 Cong. Rec. 1195–1196):

> Mr. AIKEN. Does what the Senator said mean that the measure would establish a precedent for labor in matters like the one dealt with by it?
>
> Mr. WHITE. There is no other situation like it. In the

But the discrepancy between the language adopted here and that chosen by Congress in situations where it clearly wished to impose a "job freeze" is not the only difficulty with appellants' construction of the section. The essence of appellant's position is that no employee of a consolidated railroad system should be adversely affected in any respect for a period of four years (or such lesser time as the employee had been employed by one of the merging railroads) from the effective date of the Commission's order. Thus,

---

. . pending measure we guarantee that, after the merger, labor employed before March 1941 shall continue to have employment for a period at least equal in time to the period during which it was employed by the constituent companies before the merger, with a maximum of 4 years' time. In my view there is no comparable situation. Something has been said about what have done for railroad labor, *and the question is asked why we should do more for the telegraph employees than has been done for railroad employees. I think there is a very basic difference which furnishes a convincing reason for the greater liberality on our part for the telegraph company labor.* When a railroad line is abandoned or when its services are curtailed employees affected can go to a hundred other railroads in the country seeking employment. When a corresponding change occurs with reference to a telegraph company, when the Postal Telegraph Co. disappears, there is just one place where the man who has given his life's services to the telegraph industry can go for employment, and that is to the merged company which it is proposed to set up. [Emphasis added.]

Appellants cite a statement (Br. 69–70) during the debates on the 1943 Act by Senator Hawks, an opponent of the bill and its labor provisions. But this statement does not indicate that he believed that the proposed Communications Act amendment went no further than Section 5(2)(f) of the Interstate Commerce Act but only that, in his opinion it "should not" do so.

it alleges that one of the deficiencies of the "New Orleans" conditions imposed here is that "[t]he 'conditions' are automatically inoperative until *after* the occurrence" of the events adversely affecting the employee (Br. 21). But Section 5(2)(f) does not say that no railroad employee shall be adversely affected by a merger during the statutory period. Rather, it undertakes to provide protective conditions or benefits for those who are in fact adversely affected. Thus, the first sentence provides that "the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees *affected*" (emphasis added). Similarly the second sentence (upon which appellants rely) requires the imposition of "terms and conditions providing that during the [protective] period * * * such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment" (emphasis added).*

Appellants' only explanation for the use of the general language "worse position with respect to their employment," as a substitute for the specific job protection language of the 1933 Emergency Act and the original version of the Harrington Amendment, is a

* The Commission has consistently construed Section 5(2)(f) to mean that only those employees who are or will be adversely affected by the Section 5 transaction are entitled to protection. If there is no showing of adverse effect, the Commission has, until recently, imposed no conditions or it has reserved jurisdiction either expressly or by imposing the "North Western" conditions, which simply restated the requirements of Section 5(2)(f). See the cases listed in the Appendix, *passim*, and compare the notation in the last column. See, also, the discussion of administrative practice, *infra*, pp. 63–66.

suggestion (Br. 35–36) that the phrase served as a convenient method of combining the two separate thoughts embodied in Section 7(b) of the Emergency Act, *i.e.*, the prohibitions against any employee being "deprived of employment" or being placed in a "worse position with respect to his compensation for such employment." The difficulty with this argument (aside from the fact that it has no support in the legislative history, see pp. 32–41, *infra*) is that there was no reason for such a combination and every reason why it should not be attempted. There was no ambiguity about either the Emergency Act or the Harrington Amendment, each of which required both job protection and protection against any reduction in wage compensation. A primary objective of the sponsors of the second sentence of Section 5(2)(f) was to prescribe minimum safeguards for the employees affected, thereby narrowing the discretionary authority given the Commission by the first sentence, which, they feared, might not be liberally exercised (see pp. 34–35, *infra*). In these circumstances, it would have been pointless to attempt any unnecessary "combination" of the two clear and specific terms into one general phrase with no previously recognized meaning. And that this would have been done without clearly defining the new term is scarcely credible.

On the other hand, it seems quite clear that just such a phrase as appears in the second sentence of Section 5(2)(f) might have been drafted by a person wishing (a) to insure that the Commission would be under an obligation to provide adequate protection

to affected employees and (b) to reserve for the Commission the discretion to determine the exact terms and conditions by which such protection might best be provided in the particular circumstances. In other words, this is the type of "compromise" provision which might have been drafted to resolve differences of opinion between groups wishing, on the one hand, to leave the matter of employee protection to the broad discretion of the Commission and those aiming, on the other hand, at an absolute job freeze. The legislative history, to which we now turn, confirms that view. Clouded though some of that history may be, the one firm conclusion which does emerge is that the language finally chosen represented a compromise of conflicting views. Appellants are thus arguing that the statutory language—which does not in terms support their case—is to be read as if the proponents of "job freeze" had obtained the language which they originally sought but were in fact unable to enact.

II

THE HISTORY OF SECTION 5(2)(f) SHOWS A FAILURE BY PROPONENTS OF "JOB FREEZE" TO SECURE LANGUAGE WHICH WOULD HAVE COMPELLED THAT RESULT AND THE ACCEPTANCE BY CONGRESS OF A COMPROMISE FORMULA WHICH, THOUGH IT ENLARGED EMPLOYEES' RIGHTS TO PROTECTIVE BENEFITS, DID NOT GUARANTEE CONTINUED EMPLOYMENT BY THE NEW CARRIER

A. *Historical Background of Section 5(2)(f):*

Prior to 1920, railroad mergers and consolidations were left to managerial discretion—subject only to

the antitrust laws (see, *e.g.*, *Northern Securities Co. v. United States*, 193 U.S. 197); the Interstate Commerce Act was concerned primarily with the elimination of discriminatory and unreasonable rail rates and practices.

Following the near collapse of railroad transportation in World War I and a period of government operation, Congress began to look to railroad mergers under federal regulation as one important means of assuring an efficient and healthy national railroad system. In the Transportation Act of 1920, 41 Stat. 456, 494–497, Congress, for the first time, authorized the Interstate Commerce Commission to regulate railroad security issues and to control extensions and abandonments of carriers' lines. The 1920 Act also directed the Commission to prepare a plan for the consolidation of the railroads of the country into a limited number of systems. Although the Commission was not authorized to compel consolidations it was given power to require that voluntary consolidations, submitted to it for approval should conform to the plan. (Section 407, 41 Stat. 481.) The Commission issued a tentative (63 I.C.C. 455) and a final plan (159 I.C.C. 522), but the program proved a failure, and the Commission and Congress ultimately concluded that a new approach was necessary.

During the intervening years, the depression of the 1930s put about one-third of our railroad mileage (including Erie's) into bankruptcy or receivership. The ensuing reorganizations wiped out many millions of dollars in stock and junior creditor interests. See H. Doc. No. 583, 75th Cong., 3d Sess., pp. 33, 48.

Thus, twice in the twenty years preceding 1940, the railroad segment of the national transportation system has been in serious financial difficulty.

The first provision for the protection of employees of merged railroads appeared in the Emergency Railroad Transportation Act of 1933, 48 Stat. 211. That Act established a "Federal Coordinator of Transportation," to be chosen from among the members of the Commission, who was enjoined to promote or require action to remove unnecessary duplications of services and facilities and to promote financial reorganization of carriers. Section 7(b) of the Act, 48 Stat. 214, required that the "number of employees in the service of a carrier shall not be reduced" as a result of any action under the Act. It provided further:

> [N]or shall any employee in such service be *deprived of employment* such as he had during said month of May or be in a *worse position with respect to his compensation for such employment,* by reason of any action taken pursuant to the authority conferred by this title [emphasis added].

The Senate report accompanying the above provision explained that Section 7(b) was "intended to prevent any reduction in the number of employees now in the railroad service, or reductions in pay by the coordinator or the regional committees" (S. Rep. No. 87, 73d Cong., 1st Sess., reprinted in 77 Cong. Rec. 4251).[10] The 1933 Act, in short, imposed a

[10] The section, it should be noted, related to transactions ordered under the Emergency Act and did not extend to voluntary transactions submitted to the Interstate Commerce Commission for approval under Section 5.

job freeze and assured the maintenance of prevailing earnings.

The 1933 Act, as extended, expired on June 17, 1936 (49 Stat. 376).[11] Shortly before its expiration, the Washington Job Protection Agreement of May 1936 was negotiated (R. 139). This was a collective bargaining agreement between 85% of the railroads and 21 standard railroad labor organizations, which provided protection for employees who either lost their jobs as a result of a merger or were otherwise affected by a merger. Under the agreement, an employee deprived of employment received 60% of his average monthly compensation for varying periods of time based upon length of service with the carrier.

In April 1939, the Interstate Commerce Commission held (*Chicago, Rock Island & Gulf Railway Co. Trustees Lease,* 233 I.C.C. 21) that by virtue of its authority under Section 5(4) to approve a lease of the road

[11] During the period that the Act was in effect, Federal Coordinator Eastman criticized the job-freeze provision in a report to Congress (*Regulation of Railroads*, S. Doc. No. 119, 73d Cong., 2d Sess., p. 35) as follows:

> * * * The restrictions upon reduction in railroad labor employment now contained in section 7 of the Emergency Act should be changed. They go beyond what is reasonable and stand in the way of improvements in operation and service which in the long run will be of advantage to railroad labor. The employees cannot with wisdom oppose progress which will stimulate the growth and development of the industry. It is right and proper, however, that where changes in methods of operation or administration are made, not because of lack of business, but for the primary purpose of performing work more efficiently, salvage of the employees should be a charge upon the savings effected, within reasonable limits. * * *

and properties of one railroad to another, it was empowered to prescribe "just and reasonable" conditions for the protection of employees. Exercising this power it imposed, without substantial change, the protective conditions of the Washington Agreement. In July 1939, a three-judge court held, in *Lowden* v. *United States,* 29 F. Supp. 9 (N.D. Ill.), that the Commission lacked power to impose protective conditions on behalf of employees, but in December this Court reversed, broadly sustaining the Commission's power (*United States* v. *Lowden,* 308 U.S. 225).

B. *Proceedings Prior to the Harrington Amendment:*

On September 20, 1938, the President appointed a special committee called the "Committee of Six," composed equally of representatives of railway labor and management, to submit recommendations on the general transportation situation. The Committee recommended the establishment of a new Transportation Board which, among other things, was to pass upon railway merger applications and consider "[t]he interests of the employees affected." A further recommendation was that approval of any consolidation should be made contingent upon "a fair and equitable arrangement to protect the interests of * * * employees."[12]. Recommendations of the Committee of Six were incorporated in a Senate bill addressed to the subject of mergers, unifications, and consolidations

[12] Report of the Committee of Six, December 23, 1938, reprinted in Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 2531 and H.R. 4862, 76th Cong., 1st Sess., p. 275.

(84 Cong. Rec. 6136). In almost the exact terms of the proposal of the Committee of Six, this bill provided "that the Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of section 49, a fair and equitable arrangement to protect the interest of the employees affected" (S. Rep. No. 433, 76th Cong., 1st Sess., p. 29). After several months of hearings and three days of debate on the Senate floor, the bill was passed by a vote of 70–6 on May 25, 1939 (84 Cong. Rec. 6158). On July 18, 1939, the House reported its own bill, adopting the identical language of the Senate bill with respect to employee protection (see H. Rep. No. 1217, 76th Cong., 1st Sess., p. 12).

The detailed history of the hearings and debates on these provisions are discussed at length in the appellant's brief (pp. 39–44), and need not be repeated here since the government is in substantial agreement with appellants' characterization of that portion of the history. The significance of that history is that Congress was presented with a clear choice between two types of employee protection. The first type was the job-freeze protection which had been written into the Emergency Railroad Transportation Act of 1933. The other type was the compensatory protection provided by the Washington Job Protection Agreement of 1936. In selecting the "fair and equitable arrangement" formulation as the basis for employee protection, Congress, according to the general consensus of opinion (see appellants' Br., p. 41), chose "the continuation of the protection gained by the Washington agreement" (86 Cong. Rec. 5879). Congressman Wol-

verton summed it up after the whole debate in the House was completed: "We thought we were giving legislative assurance of at least a continuance of the Washington agreement * * *" (*id.* at 10189).

Congress also recognized, however, that the grant of discretionary power to the Commission would permit it to accord additional protection to employees if, in its judgment, that proved necessary. Congressman Wolverton observed "that the language used would not preclude the Commission from improving upon the terms of that [the Washington] agreement if necessary to provide equitable and fair treatment of employees affected by any consolidation or merger in the future" (*ibid.*). And, during another phase of the debate, the same Congressman explained that the language of the provision "would guarantee to railroad labor * * * the possibility of gaining further rights by collective bargaining or by action of the Interstate Commerce Commission" (*id.* at 5879).

C. *The Harrington Amendment:*

Despite the apparent consensus, some members of the House objected on the ground that the provision was "uncertain, indefinite, and unsatisfactory" (84 Cong. Rec. 9886). Congressman Harrington, who had little faith in the type of protection offered by the Washington Agreement (see, *e.g.*, 86 Cong. Rec. 5869), characterized the "fair and equitable arrangement" provision as "[h]igh-sounding and rosy-tinted words which guarantee absolutely no safeguard to employees and, in short, mean practically nothing" (84 Cong. Rec. 9883). He thereupon offered a floor

amendment to the merger section, which was to be added as a proviso following the "fair and equitable arrangement" provision. This amendment provided "[t]hat no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees" (*id.* at 9882). There is no question, of course, that the object of the amendment was to place a permanent "freeze" on railroad employment. Congressman Harrington himself avowed that his "amendment protects the railroad worker against any unemployment or any impairment of employment rights as a result of consolidations" (*id.* at 9883).[13]

In addition to those who believed that a job-freeze provision was desirable, there were others who objected to the bill simply on the ground that a mandate to adopt a "fair and equitable arrangement" gave the Commission too broad a discretion. There was some concern that the Commission might even accord less protection than that provided in the Wash-

[13] Commissioner Eastman, the chairman of the legislative committee of the Interstate Commerce Commission, commented on this object of the Harrington Amendment in a special report to Congress, dated January 29, 1940, stating (p. 67) that the amendment "by prohibiting any displacement of employees, goes much too far, and in the long run will do more harm than good to the employees." It was the Commissioner's view (*ibid.*) that "[e]mployees who may be displaced should, in the case of railroad unifications, be protected by some such plan as is embodied in the so-called 'Washington Agreement' of 1936 between the railroad managements and labor organizations."

ington Agreement. Congressman Pace of Georgia expressed this dissatisfaction (*id.* at 9886):

> I find that quite often the different Government administrative agencies interpret acts of Congress in a manner quite different from the intention of the Members of Congress, and no one can predict what construction the carriers and the Commission would give to the very broad language "a fair and equitable arrangement"; their idea of fairness and equity might be quite different from the treatment the Congress would want them to receive. That is why this amendment is necessary to give definite expression to the treatment or "arrangement" the Congress wants the employees to receive.

Thus, the Harrington Amendment represented, in one aspect, an attempt to establish minimum conditions of employee protection which would be mandatory upon the Commission to follow.

On July 24, 1939, the amendment was adopted by the House, without a roll call, by a vote of 96–68 (*id.* at 9887); on July 26, the House bill passed (*id.* at 10127); and on July 29, both the House and Senate bills were sent to conference (*id.* at 10443).

D. *The First Conference Report:*

The Senate bill contained no provision in any way comparable to the Harrington amendment. That amendment was therefore a major point in dispute at the conference committee meeting (see 86 Cong. Rec. 5878). While the bills were pending before the conference committee, word apparently reached the House that the Harrington amendment might be

dropped. Thereupon, 275 members of the House signed a petition addressed to the House conferees, requesting "that the Harrington amendment inserted in the Wheeler-Lea bill, S. 2009, by vote of the House be retained in the conference report," or, in the alternative, if the amendment were not retained, that the "amendment be reported in disagreement so that a separate vote on same may be obtained in the House" (*id.* at 5869). On April 26, 1940, the conference committee reported out S. 2009. The committee decided to leave Section 5, as then contained in the Interstate Commerce Act, unamended. The existing law as to consolidations therefore remained untouched, "and the provisions of the bill as it passed the House, intended to facilitate consolidation, [were] omitted from the legislation. * * * These omitted provisions as to consolidation included the Harrington amendment" (H. Rep. No. 2016, 76th Cong., 3d Sess., p. 61, reprinted in 86 Cong. Rec. 5854). The committee report explained "the elimination of the consolidation provision from the bill" as obviating "the necessity of guarding against the possible unemployment that might otherwise have resulted from these provisions" (*ibid.*).

The practical reason for dropping the matter was explained by Representative Wolverton on the floor as having its roots in the fact that railroad labor itself was divided "as to the effectiveness as well as desirability of the amendment" (86 Cong. Rec. 5880; see, also, *id.* at 5878). Congressman Lea explained in similar vein (*id.* at 5864) that the point was one on which labor was not united.

With the merger provision out of the proposed bill, however, the Commission retained very broad discretion to order whatever employee protection it deemed necessary—a factor, as noted above, which had generated much of the opposition to the "fair and equitable arrangement" provision. Congressman Harrington registered his strong opposition to the conference report because it "struck out the only portion of the bill which provided direct protection and benefits to railroad workers" (*id.* at 5871). What remained in force, he said, was "the present law on railroad consolidations, which gives to railroad employees only such protection as the Interstate Commerce Commission chooses to provide under its powers to approve consolidations. * * * I am unwilling to legislate on such a vital subject matter, unless we may meet the problem courageously and completely" (*ibid.*). In this context, the Wadsworth motion to recommit was made.

E. *The Wadsworth Motion to Recommit:*

The Wadsworth motion to recommit (86 Cong. Rec. 5886) required "[t]hat the managers on the part of the House insist on the inclusion in the report of the committee of conference the provision adopted by the House, known as the Jones amendment, * * * the provision adopted by the House, known as the Wadsworth amendment,[14] * * * [and] the provisions adopted by the House relating to combinations and

[14] The Jones and Wadsworth Amendments did not relate in any way to Section 5 matters. The former related to export rates for farm commodities; the latter provided that the Commission should permit reduced rates by the various media of transportation if the rates, as reduced, would yield a compensatory return.

consolidations of carriers * * * but modified so that the sentence in section 8 which contains the provision known as the Harrington amendment read as follows:

> (f) As a prerequisite to its approval of any consolidation, merger, purchase, lease, operating contract, or acquisition of control, or any contract, agreement, or combination mentioned in this section, in respect to carriers by railroad subject to the provisions of part 1, and as a prerequisite to its approval of the substitution and use of another means of transportation for rail transportation proposed to be abandoned, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order, or certificate, granting approval or authorization of any transaction referred to in this paragraph, the Commission shall include terms and conditions providing that such transaction will not result in employees of said carrier or carriers being in a worse position with respect to their employment.
>
> * * * * *"

What was immediately apparent from the motion to recommit was that, although the Jones and Wadsworth Amendments were retained in their original language, the Harrington Amendment was altered so radically that there was no indication that it still embodied the job-freeze concept set forth in the original Harrington Amendment. This change did not escape notice on the House floor. Congressman Wolverton, in a colloquy with Congressman Bulwinkle, insisted that the motion to recommit did not contain

the Harrington Amendment. "It is an entirely different amendment. It seems as if the Harrington amendment proponents have made an additional suggestion" (86 Cong. Rec. 5885). Congressman Harrington himself referred to the amendment as "modified language for labor protection * * *" (*id.* at 5869). The reasons for the change were not stated. Doubtless, an important factor was that, during the proceedings of the conference committee, it had become obvious that the railroad labor representatives were divided in their estimate of the effectiveness and desirability of the Harrington Amendment (see *supra*, p. 31). Congressman Wolverton commented, "The fact that the former proponents of the Harrington amendment have now abandoned it and now ask the House to adopt another and different kind in its place, as set forth in the proposed Wadsworth motion to recommit, certainly makes clear a lack of confidence in the former amendment * * *" (86 Cong. Rec. 5880).

There was agreement that the modified amendment would not leave the Commission at large. Thus, one of Congressman Lea's chief complaints was that the amendment nullified the Commission's discretion under the "fair and equitable arrangement" provision (see *id.* at 5865, A2684). Congressman Harrington, on the other hand, praised the amendment for that very reason (*id.* at 5871): "The proposed labor clause sets up specific legislative standards for the Interstate Commerce Commission to follow, instead of permitting the Commission to exercise a free and easy discretion as to what is in the public interest."

But although there was agreement that the substitute provision would serve as a mandate to the Commission to establish minimum standards of employee protection, the debate throws little light on the exact meaning of the words, no "worse position with respect to their employment." Of course, it was hardly in the interest of the proponents of the original Harrington Amendment to deprecate the substitute. The job-freeze proposal had been killed. And the substitute proposal was assuredly better, from their standpoint, than a failure to issue any statutory directive to the Commission. Understandably, Congressman Harrington supported the motion to recommit and urged that it would be beneficial to employees. Thus, he stated (*id.* at 5871):

> * * * The motion to recommit * * * will contain an instruction to insert the consolidation section of S. 2009, as it passed the House, with a labor protective clause designed to accomplish the purposes intended to be accomplished by the Harrington amendment. * * *
>
> The labor protective provision, which so many of us favor, is beneficial to all railway employees. * * * By the adoption of this provision in the transportation bill, the Government refrains from becoming a party to a program that inevitably means the destruction of many jobs for railroad workers. * * *
>
> Without the labor protection provision, those railroad workers with the shortest periods of service will be cast off into the bread lines as a result of railroad consolidations. With this provision, these younger men will be spared that fate, and job eliminations will come grad-

> ually from the other end of the seniority list, as deaths, resignations and retirements occur. If S. 2009 will bring to the railroad industry the prosperity that its supporters contend for it, then the natural attrition will shortly have absorbed the employees that otherwise would be eliminated if this Congress does not now deal with this problem.[15] * * *

Although this statement undoubtedly claims that, under the substitute proposal, jobs would not be eliminated, it is notable that Congressman Harrington made no attempt to explain the difference in language between the two amendments, perhaps because he believed that compensatory protection unlimited as to time would, from the employee's standpoint, be as good as a job freeze.

Congressman Lea, on the other hand, was apparently of the view that the language of the modified amendment did not impose a job freeze. Thus, in criticizing the proposal on the ground that it failed to include a time limit, he remarked (86 Cong. Rec. A2684 (emphasis added)):

> This is a novel provision probably not heretofore written into any law in the United States. It would, by Federal law, impose on an employer the duty of indefinite if not a lifetime support of employees *for whom he no longer has a job.* It is entirely separate from retirement systems and unemployment insurance by which employees receive partial com-

[15] Similar statements were made by Congressman Thomas (86 Cong. Rec. 5883–5884) and Congressman Warren (*id.* at 5867–5868).

> pensation based on disability or length of service, or age.
>
> * * * * *
>
> * * * If we add to the employer's hazard a liability of assuming the support of all employees *when he ceases to have use for them,* regardless of the amount of salary paid or the length of service for the employer, we would thereby create a new and very great deterrent to labor employment.

In the same vein, he stated (*ibid.*) that, under the amendment, "the Commission must, without limit of time, require that an employee for whom the employer no longer has any need must be retained at the expense of the employer *on a working salary basis or on a compensation basis* totally equalling that which the employee received while performing useful service for the carrier." (emphasis added). Again, he stated, "There is no time limit in which an employer is to maintain those men in a *condition equal to that under which they were discharged*" (*id.* at 5865 (emphasis added)).

F. *The Second Conference Report:*

On August 7, 1940, the second conference report was submitted to both houses of Congress. The language agreed upon by the conferees with respect to the employee protection provision is now embodied in Section 5(2)(f), *supra,* pp. 2–3. The committee report explicitly stated that this provision was included in the conference substitute "[i]n lieu" of the Harrington Amendment "prohibiting approval of any transaction which would result in unemployment or displacement of employees, or in the impairment of their employment rights" (H. Rep. No. 2832, 76th Cong.,

3d Sess., pp. 68–69, reprinted in 86 Cong. Rec. 10167). It further stated, in commenting on the provision, that "such transaction will not result in employees * * * affected * * * being in a worse position with respect to their employment" (*ibid.*):

> * * * [T]he Harrington amendment made all employees of the affected carriers equal beneficiaries of its provisions regardless of the length of time they may have been employed prior to a consolidation. It also required the carrier to maintain the benefits of its provisions indefinitely and without any specified limitation by time or otherwise. Under the terms of the conference agreement *the benefits to employees will be required to be paid* for not longer than 4 years after the consolidation, and in no case for longer than the service of the employee for the affected carriers prior to the effective date of the order authorizing the consolidation. [Emphasis added.]

Appellants characterize "the explanation of Section 5(2)(f) by the Conference Committee" as making it "clear * * * that in the minds of the conferees the second sentence of Section 5(2)(f) was intended to provide mandatory employment protection limited to four years" (Br., pp. 61–62). As for the words, "the benefits to employees will be required to be paid," which point plainly in the direction of compensation, appellants maintain that "[s]uch an interpretation does not square with the remainder of the report * * * nor with the fact that 'employment protection' was the manifest object of the House and a departure from that object by its conferees would have had to take the form of

something more definite than such a vague reference if intended to be effective" (*id.* at p. 61, fn. 62). The rest of the report, however, gives no indication that "employment protection," as appellants use that phrase, was intended; nor is there any decisive indication that the "manifest object" of the House was to impose a job freeze.

The meaning of the amendment was elaborated in the House debate. Congressmen Lea, the chairman of the House Committee on Interstate and Foreign Commerce and of the House conferees and one of the House managers, presented the opening statement in the debate on the modified Harrington amendment (86 Cong. Rec. 10178 (emphasis added)). He discussed the "fair and equitable arrangement" provision and the provision containing the words "worse position with respect to their employment." His explanation of the latter was concerned primarily with the time limitation. First he pointed out that "the employees have the *protection against unemployment* for 4 years, but the Commission is not required to give them *benefits* for any longer period." He then pointed to "another limitation on the *protective benefits* afforded by the amendment. The *benefit* period shall not be required for a longer period than the prior employment of the employee before the consolidation occurred."

The words "protection against unemployment" do no necessarily mean "job freeze." In common parlance, such protection includes unemployment compensation, sickness and accident benefits, pension rights, retirement status etc. Indeed, benefits of this description are the ones provided for in the Wash-

ington Agreement, officially entitled Washington Job Protection Agreement of 1936. On the other hand, the references to "benefits" are irreconcilable with the concept of a job freeze. That Congressman Lea was referring to compensation became even plainer in the colloquy which followed his opening statement (*ibid.*):

> Mr. VORYS of Ohio. Would this 4-year rule have the effect of delaying a consolidation for 4 years, or would it mean that if a consolidation were made there would still be a 4-year period during which the man would be paid?
>
> Mr. LEA. No; this rule does not delay consolidation. It means from the effective date of the order of the Commission the benefits are available for 4 years. The order determines the date, and the protective benefits run 4 years from that date.
>
> Mr. VORYS of Ohio. This would be whether or not they were still employed?
>
> Mr. LEA. Yes.
>
> * * * * *
>
> Mr. O'CONNOR. * * * Does "worse position" as used mean that his compensation will be just the same for a period of 4 years, assuming that he were employed for 4 years, as it would if no consolidation were effected?
>
> Mr. LEA. I take that to be the correct interpretation of those words. * * *

Congressman Lea's position as chairman of the House conferees and one of the House managers of the bill gives his statements considerable weight. We note additionally that the speech of Congressman Wolverton (*id.* at 10189), also a conferee, quoted at length by appellants in their brief (pp. 63–66),

points in the same direction. And Congressman Halleck—also a conferee—pointed out (86 Cong. Rec. 10187) that he believed that the new provision proposed by the second conference committee "follows the principle of the so-called Washington agreement that was a contract entered into by the carriers with their employees to fix the rights of employees whose employment terminated upon consolidation." He then concluded by stating that the language of the new provision "gives to the employees greater protection and more far-reaching protection and recognizes the principle to which we all subscribe, that rights of employees should be protected, and, beyond that, write it into law."

The House agreed to the conference report by a vote of 247–75 on August 12, 1940 (*id.* at 10193).

G. *The Senate Proceeding:*

On August 30, the conference report was submitted to the Senate (86 Cong. Rec. 11269), debated, with only a very limited and unrevealing discussion of the provision here in question (see, *e.g.*, *id.* at 11269–11270, 11545), and finally agreed to on September 9 by a vote of 59–15 (*id.* at 11766). Following the adoption of the conference report, Senator Wheeler, the sponsor of the 1940 Act in the Senate and one of the Senate conferees, was granted unanimous consent "to insert in the RECORD a statement giving some explanations of certain provisions which were changed" (*ibid.*). Appellants (Br., p. 67) cite an explanatory statement by Senator Wheeler (86 Cong. Rec. 11768) that "[p]resent law is also amended by inclusion of the Harrington amendment, protecting employees in

the event of consolidations * * *," presumably to show that the Senate understood Section 5(2)(f) to include a provision which was equivalent to the original Harrington Amendment. The use of the shorthand term "Harrington Amendment" does not warrant this inference. Indeed, at other times during the Senate debate, Senator Wheeler explained that the conferees had "agreed to a compromise on the Harrington amendment" (*id.* at 11625). Moreover, at the beginning of his explanatory statement, Senator Wheeler pointed out that the conferees "again reported out the bill with substitutes for the Jones and Harrington amendments" (*id.* at 11766).

H. *Conclusions from the History:*

The firm conclusion to be drawn is a negative one: the legislative history does not provide a basis for saying that there was a clear-cut understanding or a consensus of views as to the exact meaning of the substitute language ultimately adopted—"worse position with respect to their employment." In part, the lack of clarity stems from the fact that much of the discussion which touches the point deals with other matters as well and does not focus upon the precise question before the Court. There is, however, a broader explanation of the indecisiveness of the history. As is not infrequently the case with a compromise proposal, there was considerable disposition to make the proposal appear reasonably satisfactory to persons holding varying views and predilections—hence, to deal with it in generalities rather than to define it with precision.

When all is said and done and the last efforts of the parties to pick inferences from the reports and debates are completed, these facts remain. The proponents of the "job freeze" concept started with a specific proposal not subject to misinterpretation—the original Harrington Amendment. Congress ended with a substitute—one which eliminated the language which would have compelled a "freeze" and employed other language which, at the least, invites the conclusion that the Commission would be authorized to protect employees by other means (full compensatory benefits). This change, though not carefully or fully explained, was certainly made deliberately. It cannot be passed off as inadvertent or inconsequential. We submit, in short, (1) that appellants have failed to demonstrate that there is a persuasive history to support their contention that this Court is free to treat the language enacted as if it represented no change from that originally proposed by the sponsors of the Harrington Amendment, and (2) that there was a deliberate, crucial change of phraseology dropping mention of a job freeze—a change which it is essential to take into account in interpreting the final text.

III

PRIOR DECISIONS OF THIS COURT DO NOT SUPPORT APPELLANTS' POSITION

Although they state that this is a case of first impression (Br. 83), appellants argue that two cases decided by this Court, *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142, and *Order of Railroad Telegraphers* v. *Chicago and North*

Western R. Co., 362 U.S. 330, make clear that "this Court has specifically interpreted Section 5(2)(f) as requiring the Commission to provide, as a minimum, employment protection for all employees for a period of four years following approval of a merger" (Br. 75). This is not a permissible interpretation of the Court's opinions. Indeed, this Court's previous opinions in Section 5(2)(f) cases (none of which, to be sure, involved the point at issue here) assumed that the only protection which the second sentence requires is protection in the form of compensation.[16]

In *Railway Labor Executives' Assn.* v. *United States*, 339 U.S. 142, the issue before the Court was the relationship between the first and second sentences of Section 5(2)(f) of the Act. The Commission had approved a consolidation of the interests of a number of railroads in connection with the construction and operation of a passenger terminal at

[16] In the earlier case of *Interstate Commerce Commission* v. *Railway Labor Executives Assn.*, 315 U.S. 373, the Court held that the Commission had authority to require railroads to compensate employees dismissed or displaced as a result of an abandonment. Rejecting the contention that the strengthening of the provisions relating to railroad consolidations through the adoption of Section 5(2)(f), showed that Congress intended to grant the Commission greater authority in this area than in the case of abandonments, the Court stated (315 at 379): "The modifications [of Section 5 of the Act], so far as relevant here, merely made mandatory with respect to unifications the protections for workers that had previously been discretionary." This language may have referred primarily to the first sentence of Section 5(2)(f), despite the footnote at this point in the decision setting out the entire text of the section. In all events, the opinion as a whole clearly assumes that compensatory relief is adequate compliance with the employee protection provisions of Section 5.

New Orleans. It was anticipated that the consolidation would result in an eventual displacement of approximately 300 railway employees (339 U.S. at 144, n 2). The order provided for compensatory protection of employees "affected by the consolidation," but the protection was to end four years after the effective date of the Commisison order (p. 142). Since the terminal was not to be completed within this period, many "employees affected by the consolidation would not be *displaced* until completion of the project, and therefore would receive no *compensatory protection*" (*ibid.*; emphasis added).

The question presented was whether the Commission had authority, under the first sentence of Section 5(2)(f), to provide *compensatory protection* to employees who would be affected by consolidation after the end of the four year period, or whether the second sentence established "an inflexible standard for the fair and equitable arrangement required by the first sentence" (p. 146). The Court concluded that "the Commission, while required to observe the provisions of the second sentence of § 5(2)(f) as a minimum protection for employees adversely affected, is not confined to the four-year protective period as a statutory maximum. The Commission has the power to require a fair and equitable arrangement to protect the interests of railroad employees beyond four years from the effective date of the order approving the consolidation" (p. 155).

The Court's discussion rested upon the assumption that the issue involved in construction of Section 5(2)(f) was the scope of "compensatory protec-

tion"—specifically, whether employees promptly "displaced" "may receive compensatory protection * * * but employees displaced [later] will receive none" (p. 154). In disposing of this issue, the Court undertook the detailed discussion of the legislative history of the second sentence of Section 5(2)(f) which the appellants set out in their brief at pp. 71–72. But this discussion does not stand for the proposition that "the only change made in the Harrington Amendment * * * merely placed a time limit upon its operation and nothing more" as appellants assert (Br. 72). The fallacy in appellants' argument, as we have explained *supra*, pp. 32–41, is that there were *two* changes in the Harrington Amendment: (1) the change (at the time of the Wadsworth motion to recommit) which substituted the language "in a worse position with respect to their employment" for the language of the original Harrington Amendment precluding consolidation "if such transaction will result in unemployment or displacement of employees"; and (2) the subsequent change in this modified version of the Harrington Amendment (made at the second conference on the bill) which limited the period of time during which the Commission would be required to afford this protection to four years. It is this second amendment to the Harrington proposal with which the discussion cited by appellants is concerned since the question in the case was whether the four-year limitation related back so as to circumscribe the Commission's discretionary powers under the first sentence of the section. The first modification of the Harrington Amendment, which is the one in issue in

this case, was merely mentioned in passing as "not now material" (339 U.S. at 152). In other words the Court's *Railway Labor Executives Assn.* opinion assumed that both the first and second sentences of Section 5(2)(f) dealt with compensatory relief for employees discharged or displaced and dealt solely with the question whether such relief could be continued beyond the four-year period described in the second sentence.[17] It is thus entirely consistent with our view of the statute.[18]

The same is true of *Order of Railway Telegraphers* v. *Chicago and North Western R. Co.*, 362 U.S. 330. The issue there was whether the Norris-LaGuardia Act, 29 U.S.C. 101, 108, withdrew federal jurisdiction

---

[17] This was recognized by the appellant, *Railroad Labor Executives Association* which stated in its Reply to Petition for Rehearing in that case (p. 3):

> The basic purpose of Section 5(2)(f) undeniably was to give railroad workers dismissed and displaced as a result of carrier consolidation and coordination transactions a measure of protection through compensatory benefits for a reasonable period during which they could economically readjust themselves.

[18] Indeed, it is appellants' present contention that appears inconsistent with the rationale of the *RLEA* decision. There, this Court stated its belief that continued employment during the four years following the effective date of the Commission's order was "insubstantial protection"—merely "long notice" of ultimate displacement—and subjected such employees to discrimination because other employees dismissed early in the four-year period received "compensatory protection" for the remainder of the period (339 U.S. at 154). Under the appellants' present contention, it would seem that the discrimination was against those who received compensatory protection, while those who had "long notice" of ultimate displacement received everything which the second sentence of Section 5(2)(f) requires.

to enjoin a rail strike when the purpose of the strike was to secure a job-freeze clause in a collective bargaining agreement. This, in turn, depended upon whether the controversy between the union and the railroad constituted a "labor dispute" within the meaning of the Act. In concluding that it did, the Court referred (362 U.S. at 337) to the fact that under Section 5(2)(f):

> * * * Congress * * * has expressly required that before approving such consolidations the Interstate Commerce Commission "shall require a fair and equitable arrangement to protect the interests of the railroad employees affected." It requires the Commission to do this by including *"terms and conditions"* which provide that for a term of years after a consolidation employees shall not be "in a worse position with respect to their employment" than they would otherwise have been.

Obviously, the above statement in the opinion, which is simply cast in the language of the statute, does not support appellants' interpretation. The opinion neither states nor suggests that the "terms and conditions" which the Commission is required to impose in approving consolidations or conditions amount to a job freeze. The Court was making the point that, since the Commission is required to establish terms and conditions to insure that employees shall not be in a worse position "with respect to their employment" than they would otherwise have been, the lower court erred in concluding that union efforts to negotiate about the job security of its members was an improper incursion upon "managerial preroga-

tive" (362 U.S. at 336). This is no more than a recognition of the fact that the third sentence of Section 5(2)(f)—the proviso clause—authorizes the unions and railroads to enter into agreements "pertaining to the protection of the interests of said employees." Clearly, the question whether absolute job protection is a bargainable issue is different from the question whether that is a condition which the Commission is required to impose.

The dissenting opinion, in which four Justices joined, contains an explicit rejection of appellants' position. That opinion states (362 U.S. at 355) that "[w]hile [Section 5(2)(f)] authorizes the Commission to require temporary mitigation of hardships to employees displaced by such unifications, nothing in it authorizes the Commission to freeze existing jobs."[19] It is not, of course, necessary for the Commission to argue, or for this Court to decide, in the instant case, whether the Commission might go so far as to require a job freeze. The only question before the Court is whether the Commission *must* impose that type of protection. No member of the Court or of the Commission has ever subscribed to that view. And, indeed, until very recently, as we point out in the succeeding section of this brief, the claim that a job freeze was mandatory was never urged by the railroad brotherhoods in the many proceedings in which they participated before the Commission.

[19] See, also, the dissenting opinion's conclusion, drawn from the legislative history of the Harrington Amendment, that Congress purposefully rejected the job-freeze concept (pp. 356–357).

IV

THE CONTEMPORANEOUS AND THE CONSISTENT ADMINISTRATIVE CONSTRUCTION OF SECTION 5(2)(f)—CONSISTENTLY SUPPORTED BY RAILWAY LABOR UNTIL THIS CASE—HAS BEEN THAT IT REQUIRES COMPENSATORY BENEFITS ONLY.

Section 5(2)(f) has been on the statute books for more than twenty years. Throughout this period, the Commission, without exception, has proceeded upon the premise that the section calls for the payment of appropriate compensatory benefits. The weight of this established and unvarying administrative practice (cf. *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 315; *United States* v. *Public Utilities Commission*, 345 U.S. 295, 314–315) is the more impressive when one adds that, during this time, until the evidentiary record before the Commission in the instant case was closed, the representatives of railway labor—on whose behalf the protective statute was passed—had invariably taken precisely the same position as the Commission.

In this portion of the brief, we discuss, *first*, the pronouncements of railway labor spokesmen made contemporaneously with the enactment of the statute. *Second*, we show that labor's representatives presented this same view to the Commission in proceeding after proceeding and that the Commission repeatedly endorsed it. *Third*, we trace the development of the principal types of conditions which the Commission has devised in order to provide a proper measure of compensatory benefits.

A. *The Railroad Unions' Construction of Section 5(2)(f) Contemporaneously with its Enactment:*

Following the enactment of Section 5(2)(f), appellants, as well as other unions, interpreted the provision to require compensation only, and not a job freeze. In October 1940, appellant Brotherhood of Maintenance of Way Employes advised its members, in its official organ, concerning the protective provisions in the Transportation Act of 1940 (49 *Journal* 13–14 (Oct. 1940)):

> FOUR YEARS' FULL PAY
>
> The law provides that any employe who has been in the service of a railroad four years or more, and loses his job because of a merger or "coordination", must be paid his full wages for four years. If he has been a railroad employe less than four years, he must be paid his full wages for a period as long as his previous service.
>
> No such protection and compensation have ever been guaranteed by law to the employes of any other industry, and the railroad workers secured these unprecedented benefits through the Brotherhood of Maintenance of Way Employes, in a cooperative movement with the other Standard Railroad Labor Organizations.

That same month, Mr. J. A. Phillips, President of the Order of Railway Conductors of America (now Order of Railway Conductors and Brakemen), reported on the "President's Page" of the union's journal (57 *The Railway Conductor* (now *The Conductor and Brakeman*) 308 (Oct. 1940)) that "[s]pe-

cial features of the act include protection in the form of a dismissal wage ranging up to four years' full pay for railroad employees forced out of their jobs by mergers and co-ordinations * * *."

Similiarly, that month, the Brotherhood of Locomotive Firemen and Enginemen stated in its *Magazine* (p. 223):

> During its turbulent course through the Congress, chief executives of the transportation organizations and the Order of Railroad Telegraphers put forth herculean efforts to include a provision designed to protect employes *displaced* as a result of mergers or consolidations. Finally they were successful, in face of much opposition, in securing adoption of a section which provides that [quoting the second sentence of Section 5(2)(f)]. [Emphasis added.]

In June 1941, Harold C. Heiss and Russell B. Day, Grand Lodge Counsel of the Brotherhood of Locomotive Firemen and Enginemen, discussed Section 5(2)(f) in an article in the *Magazine* (Vol. 110) entitled "Development of Labor's Legal Rights in Railroad Consolidations and Abandonments" (p. 523):

> Railway labor has thus secured for itself the unqualified legal right to be compensated in large measure for the losses resulting from consolidations, which losses were formerly shouldered upon them as being one of the inevitable consequences of a public policy that favored railroad consolidations.

Mr. George M. Harrison, Chairman of the Railway Labor Executives' Association and a member of the Committee of Six, presented an exhaustive analy-

sis of the newly enacted section in another publication (39 *Railway Clerk, Official Journal of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees* 467, 488 (emphasis added)):

> At present we see no conflict between the law and the Washington Job Protection Agreement. * * *
>
> * * * The language "worse position with respect to his employment" is not new and its meaning is well understood. It is included and has been applied under the Job Protection Agreement for four years and was included in the Commission's order in the Rock Island case. *The language means just what it says. An employee with four or more years' service must not be worse off as to his earnings and working conditions because of the consolidation for a period of four years.*
>
> * * * * *
>
> This provision will not mean anything to employees retained in service who are covered by the Washington Job Protection Agreement because such employees are guaranteed five years protection from the date of the coordination. It will however mean quite a bit to employees who are not protected by the Washington Agreement.
>
> * * * * *
>
> *Under the language of the new legislation no employee of a carrier is to be in a worse position as a result of the consolidation. He must either be kept in service without impairment of his earnings or working conditions as a re-*

sult of the consolidation or he must be made completely whole by the carrier for a period of four years if he has as much as four years' service or if not, for a period equal to the length of his service.

B. *The Contentions of the Railway Unions before the Commission and the Pronouncements of the Commission with respect to the Meaning of Section 5(2)(f):*

On October 8, 1940, immediately following the enactment of Section 5(2)(f), the Commission was presented with the first case under Section 5(2) in which the RLEA filed a protest. The applicants in *Minneapolis & St. L. R. Co. Reorganization*, 244 I.C.C. 357 (1941), requested that the proceeding be considered under the new Section 5(2) and that the hearing be reopened. A former application to acquire properties of the bankrupt company had been denied (240 I.C.C. 57). In that proceeding, RLEA had requested the financial protection approved by this Court in the *Lowden* case (308 U.S. 225). In the reopened proceeding, RLEA argued that the new Section 5(2)(f) "affirmed the jurisdiction of the Commission" to protect employees, but that under former Section 5(4) the Commission had imposed even "more comprehensive" protection than the minimum protection required by Section 5(2)(f)." The

" Memorandum Brief of the Railway Labor Executives' Association filed October 15, 1940, in Finance Docket No. 12414, p. 17:

> By this provision [Section 5(2)(f)] Congress has affirmed the jurisdiction of the Commission to impose conditions for the protection of employees, and has given it

Commission found, however, "that the possibility of the employees' being adversely affected by the proposed plan is remote, and therefore [we] consider it unnecessary to impose conditions for their protection at the present time" (244 I.C.C. at 377).[21]

Shortly thereafter, the issue involved here was presented to the Commission (*Fort Worth & D.C. Ry. Co. Lease*, 247 I.C.C. 119 (1941)), and the union made clear its position that there was no mandatory requirement of a job freeze. In *Fort Worth*, the lessor railroad planned a unification of operations to be

---

some direction in the exercise of its discretion. It appears that the Commission is required as a minimum to provide in its order "that during a period of four years from the effective date of such order" employees shall not be "in a worse position with respect to their employment" as a result thereof. In addition to this required minimum, the Commission shall further "require a fair and equitable arrangement to protect the interests of the railroad employees affected."

In other cases arising under former Section 5(4) the Commission has seen fit to impose conditions for the protection of employees which are more comprehensive than the present statutory minimum. See *Chicago, Rock Island and Gulf Railway Company Trustees' Lease*, 230 I.C.C. 181; affirmed; [*sic*] *U.S.* vs. *Lowden*, 308 U.S. 225, and *Louisiana and Arkansas Railway Company Merger*, 230 I.C.C. 156.

[21] The following later appeared in the Commission's findings (244 I.C.C. at 390):

We reserve jurisdiction to make additional findings and impose such terms and conditions as may be required by the provisions of section 5(2)(f) of the act with respect to the employees involved if upon petition by them it is made to appear that the condition of their employment has been or will be adversely affected by anything done pursuant to authority herein granted under section 5(2) of the act within the 4-year period immediately subsequent to the effective date of our order herein.

effectuated over a period of years, with major changes occurring after the first four or five years. The railroad argued along lines similar to appellants' present position—that, although the second sentence of Section 5(2)(f) was uncertain, a job freeze for four years was consistent with the language and hence no compensation was required to be paid. Thus it stated in its brief to the Commission:[22]

> * * * This will have the effect of deferring, until termination of the statutory protective period, the bulk of the savings made possible by the unified operation, but it is believed that it will afford a full compliance with the statute, and that, at the end of the period, applicant will be under no further obligations to the employees affected by the lease (R. 466, 467, 504, 505). * * *

RLEA and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees replied in a detailed memorandum that the second sentence was satisfied by providing a system of dismissal and displacement allowances:[23]

> The applicant claims that this language is to be interpreted as requiring the maintenance of every detail of the employment relationship for

[22] Applicant's Brief on Further Hearing, Finance Docket No. 12460, filed January 15, 1941, p. 50.

[23] Memorandum Brief of RLEA and the Brotherhood of Ry. and S.C., F.H., E. and S. Employees, in Finance Docket No. 12460, filed Jan. 15, 1941, pp. 17–18. Earlier in the memorandum, the unions discussed the legislative history of Section 5(2)(f), and termed the section a product of compromise (see *id.* at pp. 12–14).

a period of 4 years. It has concluded apparently that there is no way to compensate the employee for the loss of the various incidents of "employment" and that the carrier's only recourse is to continue the employment itself in toto for a period of 4 years from the effective date of the order. This, it seems to believe, is absolutely required by the language of the statute.

With this construction we do not agree. The statute as we have noted, requires that the employee must be placed in no worse position with respect to his employment. The only way in which an employment relationship can be rendered less desirable to the employee is to strip it of those incidents which are beneficial to him. Typically, an employment relationship is one where services are rendered in exchange for wages, and wages, of course, constitute the most important benefit accruing to the employee. In addition, however, he may receive added rights, benefits and privileges, such as seniority rights, rights to free transportation, benefits of hospitalization plans, etc., etc. Insofar as it is possible to maintain all these in the employee, it is possible to guarantee that he will be placed in no worse position with respect to his employment through a system of payments and guarantees which, without providing for an actual continuance of the employment itself, provides for a continuance of the benefits which the employee derives therefrom. Loss of wages may be compensated for through a system of dismissal and displacement allowances. Seniority rights may be preserved through the granting of leaves of absence.

Hospital and other privileges may be continued by the carrier at the order of the Commission. (For examples of suggested conditions preserving these supplemental benefits of the employment relationship, see Exhibit A–79, paragraph 8.) Accordingly, it is entirely possible for the Commission to impose conditions in connection with its order which will insure that no employee will be put in a worse position with respect to his employment without requiring that existing active service be maintained for 4 years or any other period in the future.

Therefore, we conclude that a comprehensive system of dismissal and displacement allowances plus reasonable assurance of the continuance of certain minor employee rights and privileges for a period of 4 years will place the employee in no worse position with respect to his employment than that which he occupied before the lease, and that such a system will accomplish this result as fully as the actual continuance of active employment during this period. Thus, insofar as the language of the statute is concerned, the Commission can satisfy the statutory minimum provided by Section 5 (2)(f) by attaching conditions providing for a system of allowances and continued benefits such as that recommended by us.

The Commission ultimately denied the application in *Fort Worth*, finding that "[t]he amount of future savings is uncertain and problematical. No present advantage in the public interest is shown" (247 I.C.C. at 127). Chairman Eastman, dissenting, stated (*id.* at 132 (emphasis added)):

> Even if no employee thus displaced or demoted were able to obtain equal or better compensation in other employment, some would, no doubt, die or retire during the period, thus releasing savings for the railroad. Under present conditions, however, it is very probable that these employees, particularly the mechanics, could obtain employment elsewhere and in many instances at equal or better compensation. *In my judgment, Congress did not, broadly speaking, intend to do more than protect the employees in the compensation they were receiving prior to the transaction. To the extent that they obtain such compensation elsewhere, the railroad should be released from payment.* If I am right in this interpretation, therefore, it is probable that under present conditions the applicant would soon be able to enjoy a very large part of the savings.

RLEA's interpretation of Section 5(2)(f), as stated in the *Fort Worth* case, was also the interpretation given to the section by the Commission in its 55th Annual Report to Congress in 1941 (p. 61):

> Briefly, the conditions require that during the protective period provided in paragraph 2(f) of the act, a displaced employee—that is, one who is retained in service by the applicants but placed in a worse position with respect to his compensation and the rules governing his working conditions—should be paid a displacement allowance; that any employee deprived of employment should be paid a dismissal allowance; and that no employee should be deprived of benefits other than wages attached to his previous employment, such as

> free transportation, hospitalization, et cetera. * * * [24]

These views were further elaborated, a few years later, in *Baltimore & O. R. Co. Operation,* 261 I.C.C. 615 (1946). In that case, the applicant railroad sought certain trackage rights over owned and leased lines of the New York Central Railroad. One effect of approving the transaction would have been to render unnecessary a prior arrangement between the applicant (B. & O.) and the Pere Marquette Railway, under which the latter operated certain through trains of the B. & O. over the same or parallel tracks as those in issue. The question presented was whether the B. & O. was responsible for any employees of the Pere Marquette who would be dismissed.

During the oral argument before the full Commission, counsel for RLEA was asked how protec-

---

[24] We also note that, in 1945, RLEA drafted and recommended to Congress (92 Cong. Rec. 7218–7219) a proposal which was designed to make certain that displacement allowances, as well as dismissal and separation allowances, would be treated as compensation for purposes of the Railroad Retirement Act. Mr. Latimer, chairman of the Railroad Retirement Board, explained during the hearings (Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 1362, 79th Cong., 1st Sess., Feb. 1, 1945, at p. 162):

> That is, for example, if a payment should be made under the terms of the Washington agreement of 1936 to a person who was displaced entirely from the service of the railroad by reason of a consolidation of two or more railroads, I think there is no question but what under existing regulations the Board would give credit for that payment as compensation for time lost. However, the case is not so clear if the payment is made by reason of displacement to a less remunerative position.

The clarifying legislation was enacted, 45 U.S.C. 228a(h).

tion of the Pere Marquette employees should be effected. The following colloquy occurred:[28]

> Mr. MULHOLLAND [for RLEA]. As I see it, the Commission could issue an order to the B & O. conditioning the granting of this application on their making provision for the protection of the employees of the Pere Marquette who might be out of a job.
>
> Commr. AITCHISON. How could they do that?
>
> Commr. PORTER. What would we say the B. & O. should do, now, to protect men that may [have] lost some seniority, or something, on another railroad?
>
> Mr. MULHOLLAND. I don't think the Commission has ever gone to the extent of trying to fix seniority rights. It is purely a question of wages. All the conditions the Commission has imposed in any of these cases has not attempted to go into the operation of the collective bargaining agreements and to regulate the seniority and the pensions, and all those things involved in collective bargaining agreements. *It comes down pretty much to a question of compensation.*

On brief, RLEA argued: "As the Commission is aware, this statute was passed to render mandatory a form of protection already made available in some cases by the Commission's own action. (*U.S.* vs. *Lowden*, 308 U.S. 225) * * *."[29]

Although the Commission refused to enter the order requiring B. & O. to be responsible for Pere Mar-

---

[28] Transcript of oral argument held February 13, 1946, in Finance Docket No. 14891, pp. 243-44 (emphasis added).

[29] Reply of RLEA to Applicant's Exceptions to Proposed Report, filed Aug. 20, 1945, in Finance Docket No. 14891, p. 9.

quette employees, it specifically reserved jurisdiction (261 I.C.C. at 618). In denying the union request, the Commission not only expressly agreed with the union's contention that compensation was now required under Section 5(2)(f), but also concluded (261 I.C.C. at 620–621):

> * * * there is an even more serious objection to the suggestion made by interveners, and that is that the statute cannot be restricted to protection against loss in job compensation alone. Clearly the statute is not so restricted but includes loss with respect to pensions, hospitalization, in the sale of homes, moving expenses, and much else. *Chicago, M., St. P. & P. R. Co. Trustees Construction,* 252 I.C.C. 49; *Chicago & North Western Trustee Abandonment,* 254 I.C.C. 820; *Oklahoma Ry. Co. Trustees Abandonment,* 257 I.C.C. 177. Each of these proceedings, among other things, involved a coordination of facilities for which authority was sought under section 5(2).[27] * * *

Three years later, the Brotherhood of Locomotive Engineers and the Brotherhood of Railroad Trainmen intervened in Finance Docket No. 16395, *Chicago B. & Q. R. Co. Trackage Rights,* 271 I.C.C. 675 (1949), to protest the transaction, and urged the

[27] The Commission held, however (261 I.C.C. at 621):

> As above stated, neither the Pere Marquette nor its facilities will be coordinated with the applicant or the New York Central by our approval of the transaction proposed here, and no practicable method has been suggested and none exists of which we are aware whereby the employees of the Pere Marquette can receive the benefits required by the statute. This situation, we believe, confirms our opinion based on the statute's language, that we are without the authority which interveners ask us to exercise.

Commission to reserve jurisdiction to impose compensatory protection, relying in their brief (pp. 11–15) on the Commission's discussion of pensions, moving expenses, etc., in the *Baltimore & O. R. Co. Operation* case (261 I.C.C. at 620–621), and stating that issues as to seniority and the determination of which employees lose jobs should be left to negotiation.

C. *The Commission's Development of Terms and Conditions for Protective Compensation During the Past Twenty Years:*

During the twenty-year period following the enactment of Section 5(2)(f), the Commission, with the active participation of the rail unions, has developed and refined various sets of conditions for the protection of employees. All of these deal with compensatory benefits. For the Court's convenience, we have listed in an appendix, *infra*, pp. 1a–23a, the published reports in cases which the Commission has decided under Section 5(2).[25] As the list shows, during the first few years, the Commission did not impose conditions of employee protection in the bulk of the cases because it expressly found, or the evidence clearly indicated, that no employees would be affected by the transactions, and no labor group intervened to protest the order. See, *e.g.*, *Illinois Central R. Co. Operation*, 242 I.C.C. 481, 483 (1940); *City of Galveston Acquisition, Operation, and Bonds*, 242 I.C.C. 605, 610 (1940); *Atchison, T. & S. F. Operation*, 244 I.C.C. 173, 175–176 (1941). In some

[25] The appendix follows the format of Appendix A, attached to the government's brief in the district court (pp. 47–70), which is now reprinted in appellants' brief as Appendix

of the early cases, in which there was either a labor union protest or the Commission itself concluded that there were unanswered questions as to the employees' situation, the Commission reserved jurisdiction so that it could enter orders to protect employees in the future, if necessary. See, *e.g.*, *Minneapolis & St. L. R. Co. Reorganization*, 244 I.C.C. 357, 377, 390 (1941); *Wabash R. Co. Control*, 247 I.C.C. 365, 375 (1941); *Northern Pac. Ry. Co. Purchase*, 247 I.C.C. 513, 517 (1941).

In 1946, the Commission altered its procedure (see *Chicago & N.W. Ry. Co. Merger*, 261 I.C.C. 672, 675–676) and began to prescribe the so-called "North Western" conditions in the categories of cases noted above, *i.e.*, those in which there was no showing of any effect on employees and those in which the future effect was indeterminate. The "North Western" conditions were simply a restatement of the statutory language. They directed a "fair and equitable arrangement" for any affected employees and that the employees be placed in no "worse position with respect to their employment."

In the same year, the Commission formulated its first comprehensive code of specific conditions for application in those cases in which the effects on employees were predictable. *Oklahoma Ry. Co. Trustees Abandonment*, 257 I.C.C. 177, 193, 196; see *Chicago*,

A (pp. 89–112). Cases which were inadvertantly omitted in the original appendix are now included, and citations have been corrected. The appendix does not purport to exhaust the Section 5(2) cases before the Commission; the cases in which no report or order was published in the bound volumes of the Commission decisions would probably triple the number shown in the appendix.

M., St. P. & P.R. Co. Trustees Construction, 252 I.C.C. 49, 252 I.C.C. 287 (1942). These "Oklahoma" conditions expanded upon the conditions set out in the Washington Job Protection Agreement of 1936. The Washington Agreement allowed a dismissed employee an allowance for six months of 60 percent of his average wage if he had been employed one to two years; this allowance progressively increased until an employee with an excess of 15 years' service received 60 percent of his average monthly salary for five years. The "Oklahoma" conditions, in addition to making certain other changes in the "Washington" conditions, prescribed 100 percent protection for a maximum period of four years from the effective date of the Commission's order."

---

[9] We note that in *Gulf M. & O.R. Co. Abandonment*, 282 I.C.C. 811 (1952), in which the Commission imposed "Oklahoma" conditions, the Brotherhood of Maintenance of Way Employes urged that those conditions met the mandatory requirements of Section 5(2)(f). See Petition of Protestants Brotherhood of Maintenance of Way Employes and Railway Employes Department [A.F. of L.] for Reargument and Reconsideration by the full Commission, filed April 11, 1952, in Finance Docket Nos. 16989 and 16990, pp. 2-4.

The "Burlington" conditions, which the Commission has applied in a number of abandonment cases, are substantially similar to the "Oklahoma" conditions. *Chicago, B. & Q.R. Co. Abandonment*, 271 I.C.C. 261 (1948).

Moreover, in numerous cases over the course of the last fifteen years, the railroads and the brotherhoods have stipulated for compensatory protection. See, *e.g.*, *Wheeling & L.E. Ry. Co. Control*, 267 I.C.C. 163, 184 (1946); *Pere Marquette Ry. Co. Merger*, 267 I.C.C. 207, 235 (1947); *Wheeling & L.E. Ry. Co. Lease*, 271 I.C.C. 713, 751 (1949); *Detroit, T. & I.R. Co. Control*, 275 I.C.C. 455, 487 (1950); *Valdosta S.R. Purchase*, 282 I.C.C. 705, 711-712 (1952); *South Georgia Ry. Co. Control*, 290 I.C.C. 281, 292 (1954); *Erie R. Co. Trackage Rights*, 295 I.C.C. 303,

In 1952, the Commission, on remand of the *RLEA* case, formulated an even more comprehensive code of protective conditions. At the behest of employee groups, the Commission superimposed the conditions of the Washington Agreement on the "Oklahoma" conditions. *New Orleans Union Passenger Terminal Case,* 282 I.C.C. 271 (1952).[20] The purpose of the "New Orleans" conditions was to protect both the employees promptly affected by the transaction and those who might be affected after the expiration of the four-year period referred to in Section 5(2)(f). These conditions, which were applied by the Commission in the instant proceeding, go beyond any type of protection previously provided and exceed, in terms of their duration, the requirements imposed by the second sentence of Section 5(2)(f).[21]

---

305 (1956); *Toledo, P. & W.R. Co. Control*, 295 I.C.C. 523, 544 (1957); and *Delaware, L. & W.R. Co. Trackage Rights*, 295 I.C.C. 746, 755–756 (1958).

[20] In the *New Orleans* case, RLEA continued to urge that "[t]he fundamental purpose of Section 5(2)(f), as clearly disclosed by its legislative history and by the decisions of the courts, was to provide railroad employees who are dismissed or displaced from their jobs, as a result of railroad consolidations, with financial assistance, through compensatory allowances, to tide them over a reasonable period of readjustment to their changed economic circumstances." Brief of RLEA, Brotherhood of Locomotive Firemen and Enginemen, Brotherhood of Locomotive Engineers, Brotherhood of Railroad Trainmen, and Order of Railway Conductors of America, filed September 19, 1951, in Finance Docket No. 15920, p. 15.

[21] To bring the administrative practice up to date, we note one other recent development. In the last several years, the Commission has initiated a different practice in cases of the kind to which it had previously applied the "North Western" conditions. It has begun to prescribe specific self-implementing conditions, along the lines of the "Oklahoma" conditions,

V

WHETHER THE NEW ORLEANS CONDITIONS IMPOSED BY THE COMMISSION PROVIDE ADEQUATE COMPENSATION IS NOT AN ISSUE BEFORE THIS COURT

Although its argument to the Commission and its complaint in the district court (R. 1–9) were grounded solely upon the claim that the language and history of Section 5(2)(f) required the Commission to preclude the merged railroads from discharging any employees, appellants' brief to the Court (pp. 2–3, 20–26) appears to argue that the Commission decision was erroneous for an additional reason—namely, that the "New Orleans" conditions imposed by the Commission in this case provided only "partial financial compensation." Appellants also contend that the district court erred in failing to consider evidence on this point which they had introduced during the course of the hearing before Judge Thornton on their motion for a temporary restraining order (Br. 85–86).

We believe that the district court was plainly correct, for several reasons, in refusing to consider evidence as to adequacy of financial protection: *first*, because the evidence was not initially presented to the

---

regardless of the showing of adverse effect in the original proceeding. It has done this in order to remove potential delay in compensating employees in the event that they are in fact adversely affected by the transaction involved. See, *e.g.*, *Missouri-K.-T. R. Co. Consolidation*, 312 I.C.C. 13, 29 (1960).

In only one case, over the years, has the Commission frozen employees to their jobs. That was done temporarily pending a full consideration of the effect of the transaction on the employees. *Baltimore Steam Packet Co. Acquisition and Control*, 244 I.C.C. 583, 605 (1941).

Commission;[22] *second,* because it was directed to a question not presented by the complaint;[23] and *third,* because one party's tender of evidence in support of an application for a restraining order hardly constitutes an adequate record for purposes of adjudicating the merits of the Commission's order.

If appellants believe that the compensatory conditions prescribed by the Commission are not adequate, this is a matter initially for the Commission, rather than the courts. Cf. *Far East Conference* v. *United States,* 342 U.S. 570, 574–575. Moreover, despite appellants' failure to raise this matter before the Commission prior to its approval of the merger application, the Commission unquestionably has authority under Section 5(9) of the Act, authorizing the issuance of orders supplemental to orders issued under Section 5(2)(f) "for good cause shown," to consider contentions which appellants may now wish to develop concerning the adequacy of the "New

[22] See *United States* v. *Jones,* 331 U.S. 641, 673; *Tagg Bros.* v. *United States,* 280 U.C. 420, 444; *Louisville & N. R.R.* v. *United States,* 245 U.S. 463, 466. Appellants' reliance upon *United States* v. *Idaho,* 298 U.S. 105 and *Baltimore & O. R.R.* v. *United States,* 298 U.S. 349, is misplaced. The former permitted the district court to admit additional testimony relating to a jurisdictional fact "left by Congress to the decision of a court" (298 U.S. at 109). See *Shields* v. *Utah Idaho R.R.,* 305 U.S. 177, 185. The *B & O* case involved a question of constitutionality. In the case at bar, the proferred evidence as to the adequacy of the compensatory conditions goes to the merits of the Commission's decision, not to the agency's jurisdiction over the subject matter or the constitutionality of its action.

[23] See *United States* v. *L.A. Tucker Truck Lines,* 344 U.S. 33, 38; *Unemployment Commission* v. *Aragon,* 329 U.S. 143, 155; *United States* v. *Hancock Truck Lines,* 324 U.S. 774, 779–800.

Orleans" conditions. The Commission, we wish to state, is fully prepared to accord appellants full opportunity to make a supplementary presentation.

Appellants suggest that the alleged failure of the "New Orleans" conditions fully to compensate employees who might be discharged by the merged railroad shows that only by precluding any discharges could the employees, as a matter of fact, be preserved in a position "with respect to their employment" as good as that previously enjoyed. In the absence of any record on the matter before the Commission, we do not attempt to resolve here the validity of their claims of inadequacy. It is enough for present purposes to note that none of the three instances of alleged deficiency in the protection provided—the failure to provide compensation for possible multiple moves (Br. 21–23); the asserted loss of accumulated annuity rights under the Railroad Retirement Act (Br. 23–24); the danger of permanent loss of employment in the railroad industry in which affected employees have developed peculiar skills (*ibid.*)—justifies appellants' conclusion.

If the Commission could require that the first employee move be paid for, it could obviously do so for subsequent moves if this is in fact a significant problem. Similarly, it can provide compensation for the accrued value of any annuity rights a discharged employee conceivably might lose.[34] As for permanent

[34] We do not believe, however, that the employees' accrued rights in the railroad retirement system will be adversely affected during the four-year protective period. We have ascertained from the Railroad Retirement Board that monthly payments made to dismissed or demoted employes pursuant

loss of employment in the railroad industry, we point out that the New Orleans conditions require the merged railroad to offer re-employment as jobs become available (R. 145–146)—in which event the employee reverts to the place in the seniority roster which he would have occupied had he remained continuously in active status (R. 144). On no theory of the statute is there a right of permanent employment with the carrier.

If it is appellants' position that a merged carrier must provide jobs even where attrition fails to create openings, it is the Commission's belief that appellants are urging an outcome which would generate serious and vexing difficulties and impede the effective consummation of mergers.[35] The National Transportation Policy seeks to foster "sound economic conditions in transportation", and Congress has long

to the "New Orleans" conditions or the Washington Agreement are treated as compensation, and the period during which such payments are made is treated as service, under the Railroad Retirement Act. Following the four-year protective period, the retirement credits of those with less than ten years' service who are no longer employed in the railroad industry will be transferred to the Social Security System. If the employee has had 10 years or more of service in the railroad industry, the accumulated fund will be retained by the Railroad Retirement Board, and at retirement he will receive both railroad retirement and social security.

[35] Appellants state (Br. 25) that "If fewer employees are needed by the merged railroad than were needed by its predecessor railroads, the surplus will be absorbed and swiftly eliminated by natural attrition." But attrition, to the extent that is predictable, will doubtless vary widely from craft to craft. Moreover, under the "New Orleans" conditions, as noted above, Erie-Lackawanna must offer re-employment as jobs become available.

sought to encourage mergers which are consistent with this objective. The recent economic trials of many carriers—including Erie-Lackawanna [36]—indicate that the implementation of sound merger proposals is a matter of pressing concern. This is not to suggest that the protection of employee interests is unimportant or secondary. The Commission's position is this: that the complexities involved in realizing the benefits of a merger will be aggravated if jobs and incidental facilities must be maintained in circumstances where there is no longer work to perform (see R. 26); that Section 5(2)(f) should not be interpreted so as to impede otherwise desirable mergers unless that result is required by a clear Congressional command; that such a command is lacking here; and that the full measure of statutory protection to which appellants are entitled may be provided by compensatory benefits.

[36] In 1960, Erie-Lackawanna reported a combined loss of almost 20 million dollars, approximately double 1959's deficits. Inability to realize merger economies promptly is a clear threat to solvency. We note in this connection that on February 28, 1961, Erie-Lackawanna applied to the Commission pursuant to Part V of the Act for a guarantee of a $15,000,000 loan to it. Under Section 504(a)(1), the Commission may not make such a guaranty unless it finds that "without such guaranty, * * * the carrier would be unable to obtain necessary funds, on reasonable terms, for the purposes for which the loan is sought.

Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions	Reasons Assigned for Absence of Conditions or for Reservation of Jurisdiction
14891	4-11-46	Baltimore & O. R. Co. Operation.	261 ICC 615, 618-621	RLEA et al.	Juris. Reserved	No showing made of probable adverse effect on employees of applicant and N.Y. Central; no jurisdiction to protect others nor is any method available for granting full compensation.
15100	2-5-46	Gulf, M. & O. R. Co. Purchase.	623, 625	No	None	Agreement reached.
15250	5-29-46	Chicago & N. W. Ry. Co. Merger.	672, 674-675	RLEA	North Western [4]	Employees unaffected but language of statute to be used uniformly as a matter of policy and to avoid future procedural difficulties in reopening the proceeding.
14500	6-28-46	Seaboard Air Line Ry. Co. Receivership.	689, 722	No	North Western	Employees unaffected.
15321	6-21-46	Pere Marquette Ry. Co. Trackage Rights.	750, 754	No	North Western	Applicant states employees will be unaffected.
14992	6-26-46	Central R. Co. of Pennsylvania Lease.	755, 779	Labor Org.	North Western	Employees unaffected.
15158	8-7-46	St. Louis, S. F. & T. Ry. Co. Trackage Rights.	267 ICC 30, 36-37	Labor Org.	North Western	Effect on employees uncertain.
14677	9-13-46	Chicago, B. & Q. R. Co. Abandonment.	38	No	None	Application dismissed on other grounds.
12859	2-27-47	St. Louis National Stockyards Co. Lease.	80	No	None	Not in issue.
14931	2-10-47	Gulf, M.&O., R. Co. Purchase, Securities.	145, 148-150	Labor Orgs.	North Western	Applicant states employees will not lose work or compensation, but not definitely shown no employees will be affected.
15181	12-10-46	Wheeling, & L.E. Ry. Co. Control.	163, 184	RLEA	Washington & North Western	Former stipulated; latter imposed for employees not represented by RLEA.

[4] The "North Western conditions," which in statutory language require that no employee be placed in a worse position with respect to his employment for four years depending on his term of rail service, are treated herein as non-self-executing conditions or in effect a reservation of jurisdiction. See also note 5 *infra*.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
LEO LOEVINGER,
Assistant Attorney General.
RALPH S. SPRITZER,
RICHARD J. MEDALIE,
Assistants to the Solicitor General.
RICHARD A. SOLOMON,
RICHARD H. STERN,
Attorneys.

ROBERT W. GINNANE,
General Counsel.
LEONARD S. GOODMAN,
Attorney,
Interstate Commerce Commission.

MARCH 1961.

APPENDIX

The following are the reported Section 5 cases decided since the enactment of Section 5(2)(f) on September 18, 1940, and reported in the bound volumes of Commission reports:

Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions	Reasons Assigned for Absence of Conditions or for Reservation of Jurisdiction
12830	10–18–40	Union Term. Ry. Co. & St. Joseph Belt Ry. Co. Control.	242 ICC 197, 212	No	None	Employees unaffected.
13007	10–29–40	Illinois Central R. Co. Operation.	481, 483	No	None	*Ibid.*
12992	11–9–40	Virginian Ry. Co. Operation.	503, 504	No	None	*Ibid.*
12958	11–26–40	Madison, I. & St. L. Co. Purchase.	586, 588	No	None	*Ibid.*
13076	11–28–40	City of Galveston Acquisition, Operation, and Bonds.	605, 610	No	None	*Ibid.*
12973	11–29–40	Denver & R. G. W. R. Co. Trustees Abandonment.	619, 620	No	None	*Ibid.*

Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions	Reasons Assigned for Absence of Conditions or for Reservation of Jurisdiction
14931	3–10–47	Gulf, M. & O. R. Co. Purchase, Securities.	267 ICC 201	No	North Western	Supp. to decision of 2–10–47, approving carriers' agreement to share protection costs; Commission had earlier required agreement be reached as condition to approving the transaction.
15181	3–10–47	Wheeling & L.E. Ry. Co. Control.	203	No	None	Not in issue; stock control case.
15228	4–1–47	Pere Marquette Ry. Co. Merger.	207, 235	RLEA	Washington & North Western	Former stipulated; latter for unrepresented employees.
14931	5–8–47	Gulf, M. & O. R. Co. Purchase, Securities.	265	RLEA	Washington & North Western	*Ibid.*
15685	6–25–47	Wheeling & L. E. Ry. Co. Control.	401, 411	No	North Western	Employees unaffected.
15711	8–18–47	Southern Pac. Co. Reincorporation.	523, 533	No	North Western	Applicant states employees unaffected.
15605	12–8–47	Niagara Junction Ry. Co. Control.	649, 661	No	North Western	Employees unaffected.

148

13085	12–18–47	Chicago, M., St. P. & P. R. Co. Trustees Construction.	690, 696	No	4-year compensation.	[See prior reports, 252 I.C.C. 49 and 287; 257 I.C.C. 292.]
15920	4–7–48	New Orleans Union Passenger Terminal Case.	763	RLEA et al.	Oklahoma	
16041	5–21–48	Beech Creek R. Co. Control.	271 ICC 1, 4	No	North Western	Applicant states employees unaffected.
14692	5–10–48	Chesapeake & O. Ry. Co. Purchase.	5	No	None	Application denied on other grounds.
15365	7–6–48	Chicago, B. & Q.R. Co. Control.	63	Labor Orgs.	None	*Ibid.*
16042	10–7–48	Union Belt Ry. Oakland Control.	223, 226	No	North Western	Employees unaffected.
15785	10–20–48	Chicago, B. & Q. R. Co. Abandonment.	261	Labor Org.	Burlington	
16325	5–5–49	Gulf, M. & O. R. Co. Purchase.	659, 665	No	North Western	Applicant does not contemplate that any employee will be adversely affected.

15a

Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions	Reasons Assigned for Absence of Conditions or for Reservation of Jurisdiction
12975	12-3-40	Wichita Falls & S. R. Co. Acquisition.	242 ICC 659, 664	No	None	*Ibid.*
13028	12-3-40	Chesapeake & O. Ry. Co. Operation.	665, 666	No	None	*Ibid.*
13026	12-18-40	Pennsylvania R. Co. Operation.	693	No	None	New R.R. line to be built.
12382	12-21-40	Dayton Union Ry. Co. Acquisition.	727, 732	No	None	Employees unaffected.
13003	12-21-40	Baltimore & O. R. Co. Operation.	763, 764	No	None	*Ibid.*
13008	12-30-40	Texas & P. Ry. Co. Operation.	775, 776	No	None	*Ibid.*
13015	1-7-41	Erie R. Co. Trustees Purchase.	244 ICC 13, 19	No	None	*Ibid.*
13017	12-30-40	Atchison, T. & S. F. Ry. Co. Operation.	32, 36	No	None	*Ibid.*
13058	1-25-41	Winchester & W. R. Co. Purchase.	150, 152	No	None	*Ibid.*
13156	1-27-41	Atchison, T. & S. F. Operation.	173, 176	No	None	*Ibid.*
11317	2-13-41	Louisiana & A. Ry. Co. Operation.	235, 236	No	None	*Ibid.*
12414	3-4-41	Minneapolis & St. L. R. Co. Reorganization.	357, 377	RLEA	Juris. Reserved	Possibility of employees being adversely affected is remote.
12698	4-9-41	New York Central R. Co. Operation.	550, 554	No	None	Employees unaffected.
13118	4-7-41	Louisiana & A. Ry. Co. Operation.	577, 580	No	None	*Ibid.*
13100	4-15-41	Baltimore Steam Packet Co. Acquisition and Control.	583	No	Juris. Reserved [1]	
13242	5-26-41	Cleveland & P. R. Co. Purchase.	793	No	Compensation for 4 years	
12656	5-8-41	Chicago, M., St. P. & P. R. Co. Trustees Operation.	247 ICC 1, 8	No	None	Employees unaffected.
13137	5-14-41	Chester & Mt. V. R. Co. Lease.	11, 13	No	None	*Ibid.*
13247	5-27-41	Greenbrier, C. & E. R. Co. Lease.	24, 26	No	None	*Ibid.*

[1] In this case the Commission under section 5(2)(c) imposed a temporary job freeze pending determination of the effect of the transaction upon the carrier's employees (at 605). No other case has been found in which even a temporary stay was imposed by the Commission following the enactment of section 5(2)(f).

Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions	Reasons Assigned for Absence of Conditions or for Reservation of Jurisdiction
16395	7-6-49	Chicago, B. & Q. R. Co. Trackage Rights.	271 ICC 675, 690-691	RLEA et al.	Washington & North Western	Little loss of employment likely; former conditions stipulated; latter imposed for others not represented by stipulating unions.
16308	7-21-49	Wheeling & L.E. Ry. Co. Lease.	713, 751	RLEA et al.	Washington and North Western	Former stipulated; effect on other employees cannot be ascertained.
15947	9-9-49	International G.N.R. Co. Trustee Trackage Rights.	275 ICC 27	Labor Orgs.	Oklahoma	
9918	8-2-49	Missouri Pac. R. Co. Reorganization.	59, 141-142	RLEA	North Western	Record does not indicate effect on employees; RLEA asks for North Western.
16378	9-19-49	Bessemer & L.E.R. Co. Merger.	167, 180	No	North Western	Applicant states employees unaffected.
16697	12-14-49	Gulf, M. & O.R. Co. Purchase.	197, 201-202	No	North Western	It is not contemplated any employee will be adversely affected.
9918	12-29-49	Missouri Pac. R. Co. Reorganization.	203, 256	RLEA	North Western	[See prior report.]
16592	3-7-50	Houston Belt & Term. Ry. Co. Control.	289, 318	Labor Orgs.	Washington and North Western	Former atipulated; extent of effect on others cannot be forecast.
16042	4-26-49	Union Belt Ry. of Oakland Control.	343, 344	No	North Western	It does not appear employees will be adversely affected.
16809	6-1-50	Cambria & Indiana R. Co. Control.	360, 365	No	North Western	Applicant states no adverse effect expected.
16496	5-2-50	Detroit, T. & I.R. Co. Control.	455, 487	RLEA	Washington and North Western	Former stipulated; latter for employees not represented by RLEA.
16167	12-5-50	Southern Ry. Co. Purchase.	724, 737	No	North Western	It does not appear employees will be adversely affected.
15947	5-23-51	International-G. N. R. Co. Trustee Trackage Rights.	282 ICC 30, 35-36	No	Oklahoma & North Western	Former agreed upon; latter for unrepresented employees although it does not at present appear others will be adversely affected.
16968	5-10-51	Savannah & A. Ry. Co. Control.	39, 57-58	RLEA et al.	Washington and North Western	Former imposed for employees represented; latter for others.
17578	1-16-52	Arkansas & L. M.	255, 263	No	North	Applicant states em-

Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions	Reasons Assigned for Absence of Conditions or for Reservation of Jurisdiction
13209	5-31-41	Burlington-R. I. R. Co. Abandonment of Operation.	247 ICC 79, 84	No	None	*Ibid.*
12460	6-9-41	Fort Worth & Denver City Ry. Co. Lease.	119	RLEA et. al.	None	Application dismissed on other grounds.
13323	6-28-41	Atchison, T. & S. F. Ry. Co. Merger.	173, 179	No	None	Employees unaffected.
13230	6-26-41	Moosic Mountain & C. R. Co. Purchase.	241, 244	No	None	*Ibid.*
12843	7-8-41	Texas & P. Ry. Co. Operation.	285	RLEA et al.	4-year compensation	
12859	7-30-41	St. Louis National Stockyards Co. Lease.	359, 363	No	None	Employees unaffected.
13225	9-23-41	Wabash R. Co. Control.	365, 375-376	No	Juris. Reserved	Employees immediately unaffected.
13194	8- 9-41	Illinois Central R. Co. Operation.	415, 420	No	None	Employees given more work, more pay.
13336	8-14-41	Gulf, M. & O. R. Co. Operation.	435, 438	No	None	Employees unaffected.
13276	8-25-41	Montour R. Co. Operation.	503, 505	No	None	*Ibid.*
13243	8-25-41	Durham & S. C. Co. Lease.	509, 512	No	None	*Ibid.*
13310	8-25-41	Northern Pac. Ry. Co. Purchase.	513, 517	No	Juris. Reserved	Employees immediately unaffected.
13010	7-29-41	Wabash Ry. Co. Receivership.	581, 622	No	None	Employees unaffected.
9033	8-28-41	Texas & N. O. R. Co. Operation.	624, 626	No	None	*Ibid.*
13218	9-2-41	Missouri Pac. R. Corp. in Nebraska Trustee Operation.	653, 656-657	No	None	Agreement reached on division of work and working conditions.
13306	8-27-41	Fort Worth & D. C. Ry. Co. Operation.	658, 660	No	None	Employees unaffected.
13393	10-3-41	Unadilla Valley Ry. Co. Purchase.	249 ICC 1, 4	No	Juris. Reserved	Employees immediately unaffected.
11915	10-3-41	Erie R. Co. Reorganization.	279, 287	No	None	Employees unaffected.
13384	10-28-41	Southern Ry. Co. Purchase.	357, 359	No	None	*Ibid.*
11915	10-27-41	Erie R. Co. Reorganization.	413, 425	No	None	*Ibid.*
13382	10-25-41	State Line & S. R. Co. Control.	441, 444	No	None	*Ibid.*

Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions	Reasons Assigned for Absence of Conditions or for Reservation of Jurisdiction
15920	1-16-52	New Orleans Union Passenger Terminal Case.	282 ICC 271	Labor Orgs.	New Orleans	
17522	2-20-52	Rockdale, S. & S. R. Co. Operation and Control.	297, 302	No	North Western	Record does not disclose effect on employees.
17584	3-31-52	Chesapeake & O. Ry. Co. Trackage Rights.	304, 305	Labor Orgs.	North Western	Trainmen protest withdrawn on understanding NW would be imposed.
16989	3-7-52	Gulf, M. & O. R. Co. Abandonment.	311	Labor Org.	Oklahoma	
17539	3-25-52	Chicago, R.I. & P. R. Co. Acquisition.	344	RLEA et al.	Burlington	
12347	3-31-52	New York Connecting R. Co. Trackage Rights.	353, 356	No	North Western	Transaction involves no change in method of operation.
17573	7-14-52	Arkansas & L.M. Ry. Co. Control.	564, 566	No	None	Present services unaffected.
17134	8-31-51	Pacific Coast R.R. Co. Control.	600, 608-609	Labor Orgs.	Washington and North Western	Former agreed upon; latter for those not protected by the stipulations.
16690	10-17-52	Gulf, M. & O. Ry. Co. Trackage Rights.	689		[See prior report above.]	
17893	12-12-52	Valdosta S. R. Purchase.	705, 711-712	Labor Orgs.	Washington, Burlington and North Western	Former two stipulated; last imposed for employees not covered under the stipulations.
17217	3-2-53	South Western R. Co. Control.	714, 723	No	North Western	Carrier to be acquired has no employees.
18118	5-29-53	United New Jersey R. & C. Co. Control.	737,740	No	North Western	It has not been shown that interest of carrier employees will be adversely affected.
13490	3-27-53	New Jersey & N. Y. R. Co. Reorg.	290 ICC 9, 34-35	No	North Western	Employees unaffected.
18068	8-4-53	Alabama & V. Ry. Co. Control.	36, 39	No	North Western	Subject carrier has no employees.
17585	8-17-53	St. Louis S. W. Ry. Co. of Texas Abandonment.	53	Labor Org.	Oklahoma	
17992	8-7-53	Harris County Houston Ship Channel Nav. Dis. Operation.	83, 92	No	North Western	Applicant states employees unaffected.
17954	10-23-53	Arkansas & L. M. Ry. Co. Construc-	112, 117	No	North Western	Employees unaffected.

Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions	Reasons Assigned for Absence of Conditions or for Reservation of Jurisdiction
13475	11-12-41	Wheeling & L. E. Control.	249 ICC 490, 494	No	None	*Ibid.*
13456	11-15-41	Los Angeles Union Stock Yards Co. Lease.	499, 502	No	None	*Ibid.*
13515	11-18-41	Harriman & N. E. R. Co. Abandonment.	518, 520	No	Juris. Reserved	Applicant expects the one affected employee to be given employment but this is not certain.
13377	12-4-41	Missouri Pac. R. Co. Trustee Purchase.	568, 570	No	None	Employees unaffected.
13332	12-6-41	Texas & N.O.R. Co. Operation.	595, 598	No	None	*Ibid.*
11915	12-13-41	Erie R. Co. Reorganization.	639, 649	No	None	*Ibid.*
13513	12-6-41	Southern Iowa Ry Co. Purchase.	653, 655-656	No	None	*Ibid.*
13551	12-23-41	Franklin & T.R Control.	743, 744	No	None	*Ibid.*
13555	12-24-41	Boston & M.R. Operation.	755, 756	No	None	*Ibid.*
13541	12-30-41	New York, S.&W.R. Co. Trustee Operation.	758, 760	No	None	*Ibid.*
13554	12-23-41	Boston & M.R. Operation.	761, 762	No	None	*Ibid.*
13550	12-23-41	Boston & M.R. Operation.	763, 764	No	None	*Ibid.*
13497	12-30-41	New York, S. &W.R. Co. Trustee Purchase.	777, 781	No	None	*Ibid.*
13085	1-17-42	Chicago, M., St. P.&P.R. Co. Trustees Construction.	252 ICC 49	RLEA	4-year compensation	[See also supplementary reports regarding the protective period at 252 I.C.C. 287 and 257 I.C.C. 292.]
13385	1-27-42	Kansas City S. Ry. Co. Purchase.	113, 116	No	None	Employees unaffected.
13539	2-7-42	Port San Lois Transp. Co. Purchase Operation and Stock.	137, 141	No	None	*Ibid.*
13730	6-8-42	Cuyahoga Valley Ry. Co. Contro'	683, 689	No	Juris. Reserved	*Ibid.*

63

78

Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions	Reasons Assigned for Absence of Conditions or for Reservation of Jurisdiction
18116	12-18-53	St. Louis S. W. Ry. Co. of Texas Lease.	290 ICC 205	Labor Orgs.	New Orleans	
18180	1-20-54	Sacramento N. Ry. Trackage Rights.	229, 231	No	North Western	Record does not show employees adversely affected.
18540	6-25-54	Arkansas & L. M. Ry. Co. Control.	243, 248	No	North Western	Applicant states employees unaffected.
18249	7-13-54	South Georgia Ry. Co. Control.	281, 282	RLEA et al.	Oklahoma	
18163	6-10-54	Wichita Falls & S. R. Co. Abandonment.	303, 323	RLEA et al.	Burlington and North Western	Former prescribed for the life of the carrier to be abandoned not to exceed 4 years; latter also imposed since properties will still be operated after 3-year test period.
9033	8-4-54	Texas & N. O. R. Co. Operation.	355,361	No	North Western	Employees unaffected.
18273	12-23-54	Louisiana & A. Ry. Co. Abandonment.	434	RLEA et al.	Burlington & Oklahoma	
9918	7-29-54	Missouri Pac. R. Co. Reorganization.	477, 612-613	RLEA	New Orleans	
9033	12-21-54	Texas & N. O. R. Co. Operation	689, 694	No	North Western	Employees unaffected.
18656	3-2-55	Louisville & J. B. & R. Co. Merger.	725, 746-47	No	North Western	*Ibid.*
18540	4-12-55	Arkansas & L. M. Ry. Co. Control.	750, 752	No	North Western	*Ibid.*
18617	9-27-55	Sacramento N. Ry. Trustees Abandonment.	295 ICC 73	RLEA et al.	Burlington	
18778	11-22-55	Wellsville, A. & G. R. Corp. Purchase and Control.	115	RLEA et al.	Oklahoma	
19182	8-27-56	Erie R. Co. Trackage Rights.	303	RLEA et al.	New Orleans	
18698	8-23-56	Camp Lejeune R. Co. Securities and Operation.	313	Labor Orgs.	None	Application dismissed on other grounds.
19829	2-5-57	Wisconsin Central R. Co. Operation.	413, 418-419	No	North Western	Applicant states employees unaffected.
9033	10-24-56	Texas & N. O. R. Co. Operation.	420, 424	No	North Western	Employees unaffected.
19315	12-20-56	Spokane International R. Co. Control.	425, 436, 439	RLEA et al.	North Western	Stock control case but coordination possible and employees request protection.
19432	12-28-56	Chicago, St. P., M.	441	RLEA	Oklahoma	

214

Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions	Reasons Assigned for Absence of Conditions or for Reservation of Jurisdiction
13793	8-14-42	Pennsylvania, O.&D.R. Co. Trackage Operation.	252 ICC 708, 710	No	None	*Ibid.*
8393	10-13-42	St. Louis S.W. Ry. Co. Control.	779	No	None	Petition dismissed on other grounds.
13496	10-13-42	Pittsburgh, L.&W. R. Co. Purchase.	254 ICC 144, 154	No	Juris. Reserved.	Applicant states no employee will be in a worse position for more than a few days and no position will be entirely abolished.
13956	11-24-42	Atchison, T.&S.F. Ry. Co. Merger.	159, 166	Emp.	None	Employees unaffected.
14054	12-29-42	Rio Grande, E.P. & S.F. R. Co. Lease.	196, 201	No	None	*Ibid.*
13496	3-8-43	Pittsburgh, L. & W. R. Co. Purchase.	202, 206	No	Juris. Reserved	Continued prior reservation of jurisdiction.
13610	3-9-43	Stockyards Ry. Co. Control.	207, 214	No	None	Employees unaffected.
13401	3-9-43	St. Paul Union Stockyards Co. Lease.	215, 220	No	None	*Ibid.*
14114	7-21-43	Erie R. Co. Purchase.	486, 490	No	None	*Ibid.*
14192	10-15-43	Kansas City Southern Ry. Co. Merger.	529, 533	No	None	*Ibid.*
14367	11-16-43	Wheeling & L.E. Ry. Co. Control.	633, 639	No	None	*Ibid.*
14360	11-26-43	Atlanta & C.A.L. Ry. Co. Bonds.	641, 650	No	None	*Ibid.*
9923	12-27-43	Akron, C. & Y. Ry. Co. and Northern O. Ry. Co. Reorganization.	694, 705	No	None	*Ibid.*
14433	5-15-44	Delaware, L. & W. R. Co. Merger.	257 ICC 91, 125	No	None	*Ibid.*
14221	5-17-44	Oklahoma Ry. Co. Trustees Abandonment.	177	RLEA	Oklahoma conditions	
14510	6-28-44	Canton, A. & N. R. Co. Lease.	346, 349	No	None	Employees unaffected.
14600	9-12-44	Delaware & H. R. Corp. Merger.	453, 476	No	None	*Ibid.*

Fin. Doc. No.	Decided Date	Title of Case	Citation	Labor Protest	Labor Conditions	Reasons Assigned for Absence of Conditions or for Reservation of Jurisdiction
18845	3-1-57	Louisville & N. R. Co. Merger.	295 ICC 457	RLEA et. al.	New Orleans	
18698	2-12-57	Camp Lejeune R. Co. Securities and Operation.	511, 518	No	North Western	No showing of adverse effect on employees of the carriers directly involved.
18991	5-31-57	Toledo, P. & W. R. Co. Control.	523, 544	RLEA et al.	Washington	Conditions stipulated.
19159	7-9-57	Central of Georgia Ry. Co. Control.	563, 582-583	No	North Western	Applicant states employees unaffected.
19583	7-23-57	Durham & S. C. R. Control.	585, 591	No	North Western	*Ibid.*
19677	4-14-58	Illinois Central R. Co. Merger.	731, 741	No	North Western	Employees unaffected.
19989	7-24-58	Delaware, L. & W. R. Co. Trackage Rights.	743	RLEA et al.	New Orleans	Conditions stipulated.
13170	11-3-58	Florida East Coast Ry. Co. Reorganization..	307 ICC 5	RLEA	New Orleans	
20026	9-7-59	Chicago S. S. & S. B. R. Trackage Rights.	329, 351	No	North Western	Employees unaffected.
20599	10-8-59	Norfolk & W. Ry. Co. Merger.	401, 439	RLEA et al.	Stipulated and Oklahoma	
19453	12-8-59	St. Johnsbury & L. C. R. Control.	489	RLEA et al.	[See Previous Report.]	
19538	10-5-59	Illinois Central R. Co. Construction and Trackage.	493, 529	No	North Western	No indication employees affected.
20852	12-11-59	Atlantic Coast Line R. Co. Merger.	614	RLEA	Oklahoma	
12347	2-8-60	New York Connecting R. Co. Trackage Rights.	702	No	Oklahoma	
20751	3-28-60	Missouri-K.-T. R. Co. Consolidation.	312 ICC 13	RLEA	Oklahoma [1]	
20438	4-7-60	Cornell Steamboat Co.-Purchase-Lowery.	55	No	None	Employees unaffected.
20956	4-28-60	Chicago, M. St. P. & P.R. Co. Trackage Rights.	75	No	Oklahoma	
21024	6-3-60	Winston-Salem Southbound Ry. Co. Control.	138	No	Oklahoma	
20978	6-24-60	Texas & N.O.R. Co. Merger.	147	No	Oklahoma	

[1] In this and succeeding cases the Commission imposed the Oklahoma conditions, regardless of the showing of affect on employees, as "self-executing" conditions in the event that employees are affected.